CLERK'S COPY

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 734

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY, AND PITTSBURGH PLATE GLASS COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FILED FEBRUARY 12, 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 734

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY, AND PITTSBURGH PLATE GLASS COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INDEX

	Original	Print
Record from D. C. U. S., Western Pennsylvania	1	1
Bill of complaint of American Sheet & Tin Plate Co., No. 3110	1	1
Exhibit A—Report of I. C. C., ex parte No. 104, May 14, 1935	20	10
Exhibit B—Eighteenth supplemental report of I. C. C., ex parte No. 104, July 5, 1935	97	49
Exhibit C—Order of I. C. C., July 5, 1935	102	51
Order setting cause, No. 3110	104	52
Petition of Allegheny Steel Co., No. 3111	105	52
Appendix A—Report of I. C. C., ex parte No. 104, May 14, 1935 (copy) [omitted in printing]	105 (28)	66
Appendix B—Eleventh supplemental report and order of I. C. C., ex parte No. 104, June 7, 1935	105 (105)	66
Petition of Pittsburgh Plate Glass Co., No. 3112	106	70
Appendix A—Report of I. C. C., ex parte No. 104, May 14, 1935 (copy) [omitted in printing]	106 (28)	82
Appendix B—Seventeenth supplemental report and order of I. C. C., ex parte No. 104, June 25, 1935	106 (105)	83
Petition of Weirton Steel Co., No. 3113	107	87
Appendix A—Report of I. C. C., ex parte No. 104, May 14, 1935 (copy) [omitted in printing]	107 (28)	100
Appendix B—Fifteenth supplemental report and order of I. C. C., June 24, 1935	107 (105)	100

	Original	Print
Record from D. C. U. S., Western Pennsylvania—Continued.		
Petition of West Leechburg Steel Co., No. 3130	108	104
Appendix A—Report of I. C. C., ex parte No. 104, May 14, 1935 (copy) [omitted in printing]	108 (25)	116
Appendix B—Thirty-fifth supplemental report and order of I. C. C., July 29, 1935	108 (102)	116
Petition of Pittsburgh Plate Glass Co., No. 3136	109	120
Appendix A—Report of I. C. C., ex parte No. 104, May 14, 1935 (copy) [omitted in printing]	109 (21)	121
Appendix B—Forty-third supplemental report and order of I. C. C., Sept. 12, 1935	109 (98)	129
Orders convening three-judge Court:		
Cause No. 3110	110	133
Cause No. 3111	111	133
Cause No. 3112	112	134
Cause No. 3113	113	134
Cause No. 3130	114	135
Cause No. 3136	115	135
Answers of United States of America:		
Cause No. 3110	116	135
Cause No. 3111	121	138
Cause No. 3112	127	141
Cause No. 3113	133	143
Cause No. 3130	139	146
Cause No. 3136	143	149
Interventions and answers of I. C. C.:		
Cause No. 3110	147	151
Cause No. 3111	154	153
Cause No. 3112	160	156
Cause No. 3113	166	158
Cause No. 3130	172	160
Cause No. 3136	178	163
Termial allowance tariffs and cancelation notices:		
AA—I. C. C. 2126	185	166
G. O.—I. C. C. 14673	188	167
AA—I. C. C. 2135	191	169
G. O.—I. C. C. 14745	193	170
I. C. C. 139	196	172
AA—I. C. C. 2212	199	174
I. C. C. 1132	202	176
I. C. C. 1170	205	178
AA—I. C. C. 879	207	180
Notice of assignment for hearings before I. C. C., ex parte No. 104		181
Orders of dismissal as to defendant Pennsylvania Railroad Co.:		
Cause No. 3110	221	187
Cause No. 3111	223	188
Cause No. 3112	224	188
Cause No. 3113	225	189
Cause No. 3130	226	189
Interlocutory injunctions:		
Cause No. 3110	227	189
Cause No. 3111	229	190

	Original	Print
Record from D. C. U. S., Western Pennsylvania—Continued.		
Interlocutory injunctions—Continued.		
Cause No. 3112	232	192
Cause No. 3113	235	193
Cause No. 3130	238	194
Cause No. 3136	241	196
Narrative statement of evidence before I. C. C. in ex parte No. 104	244	198
Caption	245	198
Statement of examiner	245	199
Allegheny Steel Co	247	199
Testimony of—		
James O. Carr	247	199
John R. Taylor	248	200
W. L. Mimm	249	201
James O. Carr (recalled)	250	201
W. L. Mimm (recalled)	252	203
C. P. Dixon (recalled)	252	203
W. C. Glynn (recalled)	253	204
West Leechburg Steel Co	255	204
Testimony of—		
N. D. Carpenter	259	206
C. P. Dixon (recalled)	262	208
Weirton Steel Co	264	209
Testimony of—		
A. S. Earp	265	209
T. H. Krich (recalled)	273	214
Pittsburgh Plate Glass Co	276	214
Testimony of—		
H. A. Putnam	277	214
C. P. Dixon (recalled)	280	217
W. C. Glynn (recalled)	281	217
George W. Oakes	285	218
J. S. McMillen	286	219
Wm. A. Brown	291	222
B. H. Stannage (recalled)	292	223
Wm. A. Brown (recalled)	296	225
H. Schante	298	225
W. A. Rambach	305	229
A. J. Sevin	307	230
Testimony of—		
W. A. Rambach (recalled)	307	231
F. P. Sackbaur	308	231
American Sheet & Tin Plate Co	309	231
Testimony of—		
W. A. Cramer	310	231
J. G. Kulp (recalled)	318	236
C. P. Dixon (recalled)	320	237
J. L. Pringle (recalled)	322	238
J. D. Beltz (recalled)	322	239
W. C. Cramer (recalled)	324	240
Wm. White (recalled)	326	241
F. J. Perry (recalled)	328	242
J. L. O'Toole (recalled)	329	243

	Original	Print
Record from D. C. U. S., Western Pennsylvania—Continued.		
Narative statement of evidence before I. C. C.—Continued.		
General testimony	331	244
Testimony of—		
Richard Van Ummersen	332	244
Frederick F. Williams (recalled)	332	244
Richard Van Ummersen (recalled)	332	244
J. R. McAnanny	339	247
A. H. Fairfield	341	249
M. V. Beckstedt	344	251
Maurice Williams	355	259
E. B. Moffatt	356	259
J. E. Ingling	378	287
H. R. Adams	381	288
Jasper N. Haines	392	274
Ira S. Auch	415	286
Ira H. Hubbel	422	289
David B. Fleming	433	295
C. L. Ewing	450	305
A. T. Owen	456	308
O. E. Schultz	466	314
F. T. Sladden	470	316
J. L. O'Toole	484	325
R. M. Pafsley	499	333
Samuel House	501	334
E. L. McCaulley	505	336
J. R. Downes	507	337
C. P. Dixon	515	341
Henry W. Beyers	517	342
J. F. Lord	534	351
D. S. Farley	539	354
G. F. Vivian	552	362
H. M. Eicholtz	563	369
W. W. Waites	569	373
E. R. Oliver	573	375
H. H. Knight	587	383
W. B. Porter	589	384
L. L. Drescher	601	390
E. A. Teed	606	393
Robert N. Nash	608	394
F. A. Key, Jr.	610	395
J. L. Shepherd	614	397
T. A. Key, Jr. (recalled)	616	399
J. A. Lynch	617	399
T. H. Meeks	620	402
J. H. Taillichet	623	403
J. S. Hershey	635	411
W. E. Maxson	640	413
B. H. Stamage	642	415
W. N. Deramus (recalled)	644	415
H. A. Weaver	653	421
C. E. Johnston	660	425
J. B. Matthews	666	429
C. E. Perkins	673	433

	Original	Print
Record from D. C. U. S., Western Pennsylvania—Continued.		
Narative statement of evidence before I. C. C.—Continued.		
General testimony—Continued.		
Testimony of—Continued.		
W. J. O'Brien	677	435
E. B. Boyd	682	438
G. H. Vivian	691	443
Eugene Morris	694	445
Julien Eysmans	713	453
W. C. Glynn (recalled)	743	467
V. W. Delaney	750	472
Wm. J. Jones	761	478
Louis C. Bihler	784	489
Harry S. Walker	797	495
J. R. Downes (recalled)	799	498
D. F. Stevens	804	499
D. T. Lawrence	808	501
R. R. Luddecke	820	510
Fred S. Riley	821	511
Stipulation as to record from I. C. C.	822	511
Order consolidating cases	824	512
Statement of evidence at final hearing on petitions for injunction	825	513
Caption	826	513
Colloquy	827	513
Offers in evidence—Portions of bills which are not denied by answers	832	516
Cause No. 3110	832	516
Cause No. 3111	840	520
Cause No. 3112	844	522
Cause No. 3113	848	524
Cause No. 3130	853	526
Cause No. 3136	855	526
Colloquy	857	527
Reporter's certificate	864	530
Order approving statement of evidence	865	530
Opinion, Schoonmaker, J.	866	530
Plaintiffs' requested findings of fact and conclusions of law	874	536
Findings of fact and conclusions of law requested by United States and I. C. C.	875	538
Objections of United States and I. C. C. to plaintiffs' proposed findings and conclusions	923	567
Findings of fact and conclusions of law	930	571
Decrees:		
Cause No. 3110	931	574
Cause No. 3111	932	574
Cause No. 3112	933	575
Cause No. 3113	934	576
Cause No. 3130	935	576
Cause No. 3136	936	577
Notice of appeal	937	578
Petition for appeal	939	579
Assignments of error	941	579
Notice to Attorney General of Pennsylvania	947	582

Order allowing appeal	948	582
Citation and service [omitted in printing]	950	583
Orders extending time	952	583
Summons and severance	956	584
Stipulation re record and order thereon	958	585
Praecipe for transcript of record	961	586
Clerk's certificate [omitted in printing]	965	588
Statement of points to be relied upon and designation as to printing record	967	588
Stipulation as to printing record	970	589

1 [File endorsement omitted.]

1 In United States District Court for the Western District of Pennsylvania

No. 3110 in Equity

AMERICAN SHEET & TIN PLATE COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND PENNSYLVANIA RAILROAD COMPANY, DEFENDANTS

Bill of complaint

Filed July 25, 1935

To the Honorable, the Judges of said Court:

American Sheet & Tin Plate Company presents and files this its bill of complaint against United States of America and Pennsylvania Railroad Company and thereupon complains and says:

(1) American Sheet & Tin Plate Company (hereinafter called the "plaintiff") is a corporation organized and existing under the laws of the State of New Jersey, having its principal operating office in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania. Plaintiff is engaged in the business of manufacturing steel, which said business is carried on at plants located throughout the United States, including plants at Vandergrift and Scottdale, Pennsylvania, and Wellsville, Ohio. In
2 the conduct of its business, plaintiff receives various commodities in carload shipments moving in interstate commerce to plaintiff's plant at Vandergrift, Pennsylvania, from points of origin in the United States outside of the Commonwealth of Pennsylvania, and ships various commodities from said plant, in carload shipment, to points of destination in the United States outside of the Commonwealth of Pennsylvania. Heretofore, similar shipments were received at and made from its plants at Scottdale, Pennsylvania, and Wellsville, Ohio, but said plant at Scottdale, Pennsylvania, is not now operating and said plant at Wellsville, Ohio, is being dismantled.

(2) Pennsylvania Railroad Company (hereinafter called the "defendant carrier") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and other states, and has its principal place of business in the City of Philadelphia, Pennsylvania. Said defendant carrier is a common carrier by railroad of interstate commerce and as such is subject to the provisions of the Interstate Commerce Act. It owns and operates lines of railroad within the Commonwealth of Pennsylvania, and receives interstate freight for delivery at plaintiff's plant at Vandergrift, Pennsylvania, and in like manner receives freight for delivery

at its said Vandergrift plant for transportation to interstate destinations.

(3) Plaintiff brings this suit in equity against the United States of America under an Act of Congress approved October 22, 1913, c. 32, 38 Statutes at Large 219 (28 U. S. C., Section 41, Subdivision 28, and Sections 45, 46, 47), and also under the general equity jurisdiction of this Court, to enjoin, set aside, annul, suspend, and restrain the enforcement, operation, and execution of a certain order entered by the Interstate Commerce Commission (hereinafter called the "Commission") on July 5, 1935, in a proceeding, entitled Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services; and to enjoin, restrain, and prevent the defendant carrier from complying with the aforesaid order of the Commission entered July 5, 1935.

3

(4) The Commission, on its own motion and without formal complaint having been filed with it, entered an order under date of July 6, 1931, in which it initiated a proceeding of inquiry "into and concerning the practices of carriers by railroad subject to the Interstate Commerce Act which affect operating revenues or expenses." Subsequently, the Commission issued its notice under date of August 13, 1931, entitled Part II, Terminal Services of Class I Carriers, and in said notice undertook to define the scope of that part of the aforesaid general inquiry. The final scope of said investigation was as follows:

"1. Whether such terminal services, in whole or in part performed in placing cars at designated locations in positions accessible for loading and unloading are services which the connecting common carriers, by operation of law, are duty-bound to perform. This question relates to three distinct methods of rendering such services, including:

4

"Group A, where the industries perform these services and receive compensation therefor from respondent carriers.

"Group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers, and

"Group C, where respondent carriers perform the services at the special convenience of the industries.

"2. Whether, in circumstances where such services are performed by the industries, any allowances made to the industries by connecting common carriers as compensation for such services, are lawful; also why, in similar circumstances, no allowances are made to other industries for performing such services."

The Commission conducted extended hearings in such inquiry, designated by it as Ex Parte 104, Part II, beginning September 15, 1931, and extending through to November 21, 1932, at various places throughout the United States. The record in the investigation consists of more than 18,000 pages of testimony and more than 500 exhibits, as plaintiff is informed.

A proposed report was prepared and issued by the Commission's Director of Service, W. P. Bartel, who conducted the investigation on the Commission's behalf. Numerous exceptions to said proposed report were filed by various parties to the record including plaintiff. Oral argument was had and, thereafter,
5 the Commission issued its report, dated May 14, 1935, and referred to by the Commission as the main report, in which the subject matter of the inquiry is reviewed generally and the legal conclusions of the Commission set forth. A copy of said main report is attached hereto, made a part hereof and marked Exhibit A. Various supplemental reports were issued under the same date, and other supplemental reports have been issued from time to time, including a supplemental report issued July 5, 1935, and designated as Eighteenth Supplemental Report, setting forth its requirements with reference to the allowance paid plaintiff. A copy of said Eighteenth Supplemental Report is attached hereto, made a part hereof, and marked Exhibit B. Said Commission likewise on July 5, 1935, entered its order accompanying said Eighteenth Supplemental Report, a copy of which is attached hereto, made a part hereof, and marked Exhibit C.

(5) As hereinbefore appears, the gist of the Commission's inquiry in said investigation related to the extent of the legal obligation of an interstate carrier to furnish terminal services to shippers and consignees. The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that car and its terminal delivery; and the terminal delivery service embodied in the American rate structure includes the placement of cars at convenient points of loading or unloading, whether upon a public team track, an industrial spur or private siding, or upon the
6 tracks of an industrial plant. Such delivery has always been understood by both carriers and shippers as a service included in the line haul rate as published by the carriers in their tariffs. The cost per car to the carriers incident to the placement of cars for loading and unloading on industrial plant tracks is less than the average cost of placing such cars on team tracks and private sidings.

It is customary for railroad companies, for various reasons, sometimes to employ other railroad companies to complete their undertakings to place cars as aforesaid and to pay such other railroad companies for such services, and sometimes to employ the shipper or receiver of freight to complete their undertakings to place cars as aforesaid, and in such cases to make allowances to such shippers or receivers of freight for such services. Such allowances to shippers are authorized by Section 15, paragraph 13, of the Interstate Commerce Act.

(6) For many years the defendant Railroad, by its solicitation, by its tariffs filed and published, and by its long established course of conduct in the furnishing of terminal delivery service under such tariffs, has recognized that its tariffs applicable to shipments to and

from the Pittsburgh district, which includes plaintiff's Vandergrift plant, and as in the case of other similar rate districts, embrace all the transportation services aforesaid, including the placement of cars at convenient points of loading or unloading, whether upon a public team track, an industrial spur or private siding or upon the tracks of an industrial plant. No charge in addition to the
7 published line haul rate has been claimed or collected by the defendant carrier for the performance of such terminal delivery service.

The record in the aforesaid investigation by the Commission in Ex Parte 104, Part II, contains abundant testimony by numerous witnesses supporting the averments of paragraphs (5) and (6) hereof; and there is no evidence in said record to the contrary.

There is no evidence in said record that the carriers in serving any industrial plant, warehouse, or other business establishment have sought to limit their duty or terminate their obligation under the line haul rates by the placement of cars at any points short of or intermediate to the place mutually agreed upon with the shipper or consignee as reasonable or convenient for the loading or unloading of carload freight.

(7) On April 28, 1917 defendant carrier issued, effective June 1, 1917, its tariff No. AA–I. C. C. No. 879, and duly filed the same with the Commission in accordance with the provisions of section 6 of the Interstate Commerce Act, providing for the payment of an allowance to plaintiff for the latter's transportation service of moving and placing cars at loading and unloading points in its plant, and reading as follows:

8 "Pennsylvania Railroad Company

"Philadelphia, Baltimore & Washington Railroad Company

"West Jersey & Seashore Railroad Company

"Local Freight Tariff

"Terminal allowances to American Sheet and Tin Plate Company at Vandergrift, Pa., applying on coal and coke traffic to and from points on or reached via the Pennsylvania Railroad Company

"On all carload revenue shipments, destined to or coming from the plant of the American Sheet and Tin Plate Company, the latter company performs the terminal switching service for account of the Pennsylvania Railroad Company.

"The American Sheet and Tin Plate Company will be allowed for such service, out of the current Vandergrift, Pa., rate the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet and Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding [1] $1.10 per car.

---

[1] Reduction.

9 "The foregoing arrangement does not include traffic handled under switching charges as named in Tariff C and C.—P. S. C.—Pa.—No. 426, applicable on Bituminous and Cannel Coal, or reissues thereof.

"Effective June 1, 1917.

"Issued April 28, 1917, by—

H. C. CLEVENGER,

"*Coal Freight Agent, Philadelphia, Pa.*"

The aforesaid tariff has at all times since June 1, 1917, been in effect, and defendant carrier has made allowances strictly in accordance with the terms and conditions contained in said tariff.

Similarly, defendant carrier on February 20, 1934, issued its tariff I. C. C. 1170, effective March 25, 1934, and superseding an earlier tariff of the same character, reading as follows:

"Tariff 506–B

"The Pennsylvania Railroad Company

"Local Freight Tariff

"Terminal Allowances to American Sheet & Tin Plate Company at Vandergrift, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad

"On all carload revenue shipments, also on cars containing
10 6,000 pounds or more of less carload freight destined to or coming from plant of the American Sheet & Tin Plate Company, the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company.

"The American Sheet & Tin Plate Company will be allowed for such service, out of the current Vandergrift, Pa., rate, the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet & Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding $1.10 per car.

"When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car. The allowance for each additional car in the series or lot will be fifty-five (55) cents or fifty (50) percent of the allowance for the first car, except that in instances where cars are loaded to their full or safe carrying capacity, the per car allowance of $1.10 will be made for each car.

"On cars containing excess shipments of carload freight handled under Rule 24 of the Official Classification, I. C. C.—O. C. 52, P. S. C.—Pa.—O. C. 52, (A. H. Greenly, Agent), supplements thereto or successive issues thereof, the allowance will be fifty-five (55) cents or fifty (50) per cent of the allowance for the first car.

"The foregoing arrangement does not include traffic handled under switching charges named in Pennsylvania Railroad Tariff I. C. C. 691, P. S. C.—Pa. 384, supplements thereto or successive
11 issues thereof; nor on traffic handled under Pennsylvania Railroad Local Freight Tariff P. S. C.—Pa. 290 (Agent's Index 88) or successive issues thereof; nor on shipments of Slag, Ashes or Other Refuse Material for Wasting, as named in Agent B. T. Jones' Tariff 226-B, I. C. C. 1695, P. S. C.—Pa. 97, supplements thereto or successive issues thereof.

"Will not apply on coal or on coke (the product of coal) or on ex-lake iron ore.

"Issued February 20, 1934. Effective March 25, 1934."

Said tariff I. C. C. 1170 and earlier tariffs of the same character were duly filed with the Commission and have been in effect for many years.

The allowance provided by said tariffs is less than the cost to plaintiff of performing the aforesaid terminal services and is less than it would cost the defendant carrier to perform the services with its own engines and employees, and such allowance is in all respects just, reasonable and lawful.

(8) Defendant carrier has filed with the Interstate Commerce Commission and Public Service Commission of Pennsylvania a cancellation notice designated Supplement 1 to AA—I. C. C.–879, effective August 22, 1935, withdrawing and cancelling said tariff and the allowance to plaintiff therein provided for. Said cancellation notice provided as follows:

12 "The Pennsylvania Railroad Company

"Cancellation Notice

"AA—I. C. C. 879

"C. and C.—P. S. C.—Pa. 620

"Local Freight Tariff

"Terminal allowances to American Sheet and Tin Plate Company at Vandergrift, Pa., applying on Coal and Coke Traffic To and From Points On or Reached Via The Pennsylvania Railroad Company is hereby cancelled

"Terminal Allowances Discontinued

"Issued July 17, 1935 By:

G. P. Shaw,
Chief of Tariff Bureau,
15 N. 32nd Street, Philadelphia, Pa.

"Effective August 22, 1935. In Compliance with Eighteenth Supplemental Report and Order of Interstate Commerce
13 Commission in Ex Parte No. 104 Part 2, July 5, 1935."

Similarly, defendant carrier has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a cancellation notice designated Supplement 1 to I. C. C. 1170, effective August 22, 1935, withdrawing and cancelling said tariff and the allowance to petitioner therein provided for. Said cancellation notice provides as follows:

"Cancellation Notice

"Tariff 506-B

"The Pennsylvania Railroad Company

"Local Freight Tariff

"Terminal Allowances to American Sheet & Tin Plate Company at Vandergrift, Pa., On Traffic To and From Points On or Reached Via The Pennsylvania Railroad is Hereby Cancelled

"Allowance Discontinued

"Issued in compliance with Eighteenth Supplemental Report and Order of the Interstate Commerce Commission in Ex-Parte 104, Part 2, decided July 5, 1935.

14 "Issued July 18, 1935. Effective August 22, 1935."

Defendant carrier has given to plaintiff no reason for the aforesaid cancellation of allowances except the issuance of said order of the Commission dated July 5, 1935, Exhibit C herein, and by virtue of the statement upon said cancellation notices that the same are given in compliance with said order of the Commission, plaintiff alleges that the defendant carrier would not have filed said notices cancelling said allowances were it not for the compulsion of said order of the Commission and the fear of incurring penalties upon failure to comply therewith.

(9) Said order of the Commission, dated July 5, 1935, Exhibit C herein, is unlawful and void in the following respects:

1. The Commission was without authority to make said order.

2. The Commission failed to make requisite findings to support its order.

3. The Commission's said report and order are arbitrary and in conflict with all previous rulings as to the duty of a common carrier by railroad to perform the service of placement of empty cars for loading at and removal of loaded cars from points of loading and placement of loaded cars at and removal of empty cars from points of unloading within the plant of the plaintiff.

4. There was no evidence upon which the Commission could find:

(a) That defendant carrier has complied with its obligation to

15 plaintiff under its rates for interstate transportation to deliver and receive carload freight when they place cars containing said freight on the so-called interchange tracks described of record or remove the cars therefrom;

(b) That the service of moving cars beyond the so-called interchange tracks is a plant service;

(c) That by the payment of an allowance to plaintiff for services performed by it in moving cars containing interstate shipments beyond the interchange tracks, defendant carrier provides the means by which plaintiff enjoys a preferential service not accorded to shippers generally;

(d) That to refund or remit a portion of the rates and charges collected or received as compensation for the transportation of property as set forth in said Eighteenth Supplemental Report is in violation of paragraph (7) of section 6 of the Act;

(e) That the payment of the allowances to plaintiff was either unnecessary or improvident or increased or decreased the earnings of the defendant carrier.

5. The evidence on which the order is based shows conclusively that the terminal allowance paid by the defendant carrier to plaintiff is for a transportation service covered by the rate; that the said terminal allowance is no more than just and reasonable and, being publisned in the tariffs of the defendant carrier, is binding upon it.

16 6. The evidence fails to show any violation of law by plaintiff or by the defendant carrier in connection with the terminal allowance at plaintiff's Vandergrift plant as above described.

(10) Plaintiff at its Vandergrift plant has handled and will continue to handle for defendant carrier loaded cars on which the terminal allowance payable as compensation for said handling in accordance with the tariffs of the defendant carrier is in excess of $1,200.00 per month. Unless the aforesaid order of July 5, 1935, Exhibit C herein, be set aside and the defendant carrier be required to withdraw its cancelling tariffs, plaintiff will be compelled to perform said service of transportation for the benefit of defendant carrier but at its own cost and expense, without the possibility of payment being made by defendant carrier in the absence of tariff authority, and plaintiff will be unable to have its materials shipped at rates which are just and reasonable, nondiscriminatory and nonprejudicial, thereby subjecting plaintiff to irreparable loss and injury.

Wherefore, Plaintiff being without any adequate remedy at law prays: That writs of subpoena be issued by the Clerk of the Court, as provided by law, commanding the United States of America and the Pennsylvania Railroad Company to appear and defend this action; that notice hereof be given to the Attorney General of the

United States and to the Interstate Commerce Commission; that upon the filing of this bill the Judge of this Court call to his
17 assistance two other Judges, one of whom shall be a Circuit Judge, and that upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to said defendant carrier, the plaintiff be granted an interlocutory injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order which requires defendant carrier to cease and desist on or before August 22, 1935, and thereafter to abstain from the practice in said order described; and that upon final hearing of this case, a decree be entered adjudging the said order to be in all respects null and void and permanently enjoining, annulling and setting aside the enforcement, operation, and execution of said order.

And plaintiff further prays that a preliminary or interlocutory order or injunction be entered, requiring the defendant carrier to cancel the tariffs herein referred to, filed in alleged conformity with the said order of the Commission, and suspending the cancellation of the terminal allowance now being paid plaintiff, until final determination of this cause, and that upon the final hearing herein, a decree be entered perpetually enjoining, suspending, annulling, and setting aside the said tariffs and requiring the said defendants to file new tariffs restoring the terminal allowances in effect on July 4, 1935, on interstate traffic handled by the plaintiff at its said plant at Vandergrift, Pennsylvania, unless and until changed by agreement of the parties or by a lawful decision of the Interstate Commerce Commission.

18 Plaintiff further prays, inasmuch as the purpose of the foregoing prayers for relief is to set aside the order of the Commission of July 5, 1935, and to restore the status quo of July 4, 1935, for such other and further orders or decrees as may be necessary to set aside said order of the Interstate Commerce Commission and to require the defendant carrier to vacate, annul, and set aside any and all action which may have been taken under and by reason of said order of the Commission, and to take such action as may be necessary to restore the parties and properties affected by said order to the status of July 4, 1935, and for such further and other relief in the premises as the nature of the case shall require, and to this court shall seem meet.

DAVID A. REED,
ROBERT L. KIRKPATRICK,
ARTHUR B. VAN BUSKIRK,
Solicitors for Plaintiff,
747 Union Trust Building, Pittsburgh, Pennsylvania.

19 [*Duly sworn to by C. W. Bennett, jurat omitted in printing.*]

20 *Exhibit A. to bill of contplaint*

Interstate Commerce Commission

Ex Parte No. 104

Practice of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Submitted October 17, 1934. Decided May 14, 1935

Upon investigation into practices of carriers affecting operating revenues or expenses with relation to terminal service of Class I carriers by railroad, found that:

1. When a carrier is prevented from performing an uninterrupted service to the points of loading or unloading within the confines of an industrial plant because of some action or disability of the industry or its plant, the carrier's duty with respect to the delivery or receipt of cars does not extend beyond the point of interruption or interference, and any allowance to the industry for performing the service beyond such points or the performance of service by the carrier beyond such points without proper charge is unlawful in violation of section 6 of the act.

2. At many industries delivery and receipt of freight is
21 effected by carriers on interchange tracks because of interference or interruption to the work of both the industry and the carrier which would be encountered beyond such tracks. Under such circumstances, delivery or receipt on such tracks constitutes delivery or receipt under the line-haul rates.

3. When the spotting service at an industry requires a service in excess of that required in making simple placement or the equivalent of team track spotting, such service is in excess of that required of a common carrier under its line-haul rate, and any allowance to the industry for performing such service or the performance thereof by the carrier without charge over and above the line-haul rate is unlawful in violation of section 6 of the act.

4. The payment by respondents of allowances to individual industries for the performance of spotting service at the latter's convenience, or the assignment by respondents of locomotives to perform similar service without charge, dissipates respondents' funds and revenues, to be not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and not in the public interest.

Sidney S. Alderman, Harry I. Allen, C. L. Andrus, B. S. Atkinson, Thomas Balmer, J. R. Barse, B. F. Batts, C. S. Beattie, Charles S. Belsterling, J. R. Bell, E. E. Bennett, L. J. Birch, Charles H. Blatchford, Elmer F. Blu, M. L. Blum, H. D. Boynton, J. R. Branley,

G. P. Brock, William S. Bronson, C. W. Brosius, Clyde Brown,
22 N. S. Brown, H. L. Burford, C. S. Burg, E. H. Burgess, T. H. Burgess, E. W. Camp, William D. P. Carey, E. G. Clark, A. F. Cleveland, F. A. Cleveland, A. J. Clynch, A. L. Coey, W. A. Cole, William W. Collin, Jr., William C. Combs, John F. Connors, John J. Danhof, L. B. da Ponte, A. G. Davis, J. N. Davis, Tom Martin Davis, W. E. Davis, W. G. Degelow, Ernest C. Dempsey, Robert F. Denison, T. F. Dooley, E. G. Doroty, George Cochran Doub, F. M. Dudley, Gerald E. Duffy, Fayette B. Dow, G. G. Early, O. G. Edwards, A. H. Elder, Charles E. Elmquist, W. F. Everding, W. Hal Farr, George H. Fernald, Allister Fraser, J. A. Gallagher, F. M. Garland, P. F. Gault, T. D. Gresham, C. L. Groom, W. L. Grubbs, A. J. Grummett, August G. Gutheim, R. J. Hagman, E. J. Malberg, C. A. Halpin, M. Carter Hall, A. S. Halsted, Charles A. Hart, Henry J. Hart, Thomas P. Healy, Carl R. Henry, C. C. Hine, George W. Holmes, E. E. Horton, C. A. Hunt, George W. Imgrund, Bronson Jewell, Harry R. Jones, L. C. Jorgensen, F. A. Key, A. G. Kingsley, A. H. Kiskaddon, John B. Keeler, Jarvis Langdon, Jr., W. J. Larrabee, H. H. Larimore, A. H. Lossow, J. A. Lynch, James E. Lyons, Thomas H. Maguire, Andrew P. Martin, Eldon M. Martin, James Martinbee, G. B. Mathews, Frederic D. McCarthy, H. H. McElroy, Walter McFarland, W. N. McGehee, L. L. McIntyre, C. B. McManus, Carleton W. Meyer, W. R. Middleton, Clark H. Miley, Clarence A. Miller, J. H. Miller, E. B. Moffatt, Frank H. Moore, A. R. Morton, P. K. Motheral, G. H. Muckley, John W. Murphy, H. T. Newcomb, George S. Nichols,
E. R. Oliver, Guernsey Orcutt, George P. Orlady, Conrad
23 Olson, R. S. Outlaw, James V. Oxtoby, R. G. Parks, W. F. Peter, Marion B. Pierce, Roy Pope, Horace H. Powers, Thomas L. Preston, C. M. Price, H. M. Quigley, J. T. Quisenberry, W. A. Rambach, L. C. Reddish, K. L. Richmond, W. A. Robbins, M. G. Roberts, Fletcher Rockwood, G. B. Ross, William R. Seaton, John C. Shields, H. D. Sheean, J. R. Skillman, F. V. Slocum, C. A. Smith, C. H. Smith, Dana T. Smith, Elmer A. Smith, J. M. Souby, H. V. Spike, B. H. Stanage, C. P. Stewart, W. J. Stevenson, James Stillwell, H. A. St. John, Edward F. Stock, William F. Strang, L. H. Strasser, C. C. Straub, O. E. Swan, G. M. Swanstrom, A. Syverson, J. H. Tallichet, M. W. Thomas, Robert Thompson, D. L. Tilley, F. H. Towner, William Jay Turner, John L. Tye, Jr., Arthur Van Meter, H. L. Walker, Fred L. Wallace, Charles R. Webber, R. E. Wedekind, M. J. Welsh, R. F. White, H. R. Wilkinson, Eugene S. Williams, Felix M. Williams, George Williams, Maurice Williams, W. K. Williams, L. F. Wilson, C. T. Wolfe, J. W. Womble, Frederick H. Wood, D. S. Wright, James F. Wright, J. C. Wroton, and D. Lynch Younger for respondents and other carriers.

G. T. Avery, Ernie Adamson, F. A. Allen, Harry I. Allen, C. O. Applehagen, Clinton S. Abbott, Charles J. Austin, J. R. Allen,

R. C. Allen, A. G. Anderson, Baker, Botts, Andrews & Wharton, Thomas Balmer, H. H. Bascom, John W. Bingham, H. J. Bennett, T. E. Banning, W. J. Bailey, Wm. C. Boyd, F. C. Broadway, J. C. Beck, J. W. Brown, Clifford H. Browder, F. G. Buck, H. O. Berger, M. P. Bauman, George P. Boyle, John S. Burchmore, Nuel D.
24 Belnap, Frederick E. Brown, T. H. Burgess, L. H. Brenner, J. E. Bryan, Fred B. Blair, Frank F. Bergstrom, D. L. Bennett, T. C. Burwell, George E. Clinton, W. Clive Crosby, Joseph W. Connolly, W. P. Coughlin, John R. Cochran, J. A. Coakley, J. E. Considine, R. B. Coapstick, J. P. Cassidy, W. G. Clayton, A. J. Clynch, Johnston B. Campbell, Willis Crane, Carl R. Cunningham, G. B. Cromwell, Calvin A. Campbell, Jr., Call & Murphy, William W. Collin, Jr., H. W. Chapman, F. H. Compton, H. J. Carey, L. W. Cobb, W. H. Chandler, Benjamin Conliff, William H. Connell, F. M. Crawford, A. W. Clapp, Cravath, de Gersdorff, Swaine & Wood, J. C. Davie, J. B. Dempsey, F. A. Dobber, Ralph H. Drake, Fayette B. Dow, W. H. Day, G. J. Durpey, Edward S. Depass, G. L. Dalton, Walter David, J. R. Davis, Floyd C. Davis, James F. Dougherty, R. H. Dunn, J. N. Deller, W. Burl Dalton, Wm. A. Dougherty, J. G. Dickson, E. W. Demarest, John C. Dunn, Arthur W. Dowds, Charles Donley, W. F. Everding, A. C. Ellis, Jr., H. S. Elkins, W. W. Eismann, R. Z. Eaton, R. A. Ellison, Charles Ervin, William F. Ehmann, G. R. Farmer, E. T. Foxenbergh, S. L. Felton, Charles J. Fagg, W. B. Faulkner, C. L. Franklin, Harry D. Fenske, W. S. Foster, R. W. J. Flynn, G. E. Flanders, J. M. Fleming, W. H. Francis, C. C. Furgason, T. D. Geoghegan, Ludwick Graves, C. L. Broom, E. D. Grinnell, R. H. Goebel, Paul J. Gates, Robert B. Goodman, F. M. Garland, E. S. Gubernator, Byron M. Gray, Bernard L. Glover, W. D. Goble, A. G. Grim, Charles Gallagher, A. C. Graham, R. J. Hagman, C. A. Hart, G. B. Hetherington, C. Hershey, H. F. Hovey, Fred W. Haas, G. R. Hanks, Bryce L. Hamilton,
25 W. H. Hooper, J. W. Holloway, C. E. Hochstedler, A. E. Hickerson, F. T. Horan, S. T. Henson, W. J. Hammond, W. T. Hancock, J. D. Hurst, James J. Hailey, J. P. Haynes, Wayne P. Hendricks, J. O. Houze, Henry Hauseman, E. M. Hayden, I. M. Herndon, C. R. Hillyer, F. S. Hollands, W. E. Heidinger, George F Hichborn, J. K. Hiltner, A. C. Hultgren, E. M. Hodges, F. G. Ibach, H. Ignatius, E. A. Jack, J. W. Jamison, W. H. Johns, J. Jones, R. L. Jones, J. C. Husteson, George Jay, R. L. Korf, F. S. Kieser, Elmer J. Klebba, Kemper K. Knapp, H. H. Knight, Lee Kuempel, F. W. Kerr, John B. Keeler, Russell W. Krantz, A. R. Kennedy, Edward F. Lodwige, T. A. L. Loretz, H. J. Lang, A. G. Linnemann, W. R. Lynch, S. C. Loughbridge, W. H. Lougheed, A. P. Lane, W. A. Latham, Arthur S. Lytton, Stanley M. Low, H. H. Lucas, Wilbur LaRoe, Jr., C. A. Lahey, W. B. Lewis, J. S. Marvin, J. E. Monroe, H. D. McKnight, Kenneth A. Moore, Herman Mueller, A. King McCord, George W. Morgan, Lambert McAllister, R. H. McElroy, Parker McCollester, H. G. McNamara, John T. Money, T. M. Milling, F. R. McFarland, H. O. Mackinch, Robert Elmer Minton, C. C. Milliken, T. W.

Mackey, T. J. McLaughlin, W. J. Mathey, Hoyt A. Moore, H. D. Musick, M. J. McMahon, E. W. McKay, Andrew P. Martin, James H. Myler, J. A. Maher, A. A. Mattson, Herbert H. Moffitt, Donald D. Moore, James McEvory, John W. Murphy, W. F. Morris, Jr., Earle J. Machold, D. T. Meyers, C. R. MacCarey, Charles W. Mays, H. E. McGiverson. E. L. Maynard, William A. Moore, J. P. Magill, W. M. Maddox, Harry J. Newton, W. J. Nokely, F. H. Nesmith, Cecil A. New, Norman, Kuirk & Graham, C. Ohlsen, James
26 V. Oxtoby, E. W. Owens, J. B. Orr, R. W. Ostrander, R. S. Outlaw, J. W. Porter, Richard Parkhurst, Stephen A. Power, F. A. Perry, F. E. Paulson, Philip H. Porter, W. H. Pease, W. H. Perry, R. W. Poteet, Robert E. Quirk, R. D. Reese, P. A. Ripley, W. J. Rowley, A. J. Radosta, Jr., J. R. Roberts, M. G. Roberts, Fred M. Renshal, John Rowe, G. B. Ross, Fletcher Rockwood, W. E. Rosenbaum, Frank E. Robson, R. M. Robinson, H. W. Roe, A. A. Raphael, M. C. Richards, C. R. Scharff, A. J. Sevin, Charles Schakell, A. H. Schwietert, G. M. Sherman, C. M. Shepherd, E. D. Sheffe, James J. Shaw, H. M. Slater, Samuel G. Spear, W. R. Scott, Marshall G. Sampsell, Walter F. Schulter, C. R. Seal, E. W. Sieboldt, H. R. Snyder, Leonard Simms, Charles W. Stiver, F. L. Sullivan, J. H. Shaw, C. A. Sullivan, C. H. Sullivan, H. C. Schimmelman, R. O. Stevenson, G. H. Staat, W. D. Sankey, Jr., F. L Stokes, Ned A. Stewart, Walter A. Smith, Hal H. Smith; Frank M. Swacker, C. T. Stripp, Elmer R. Terry, Frank H. Towner, Herbert Thompson, G. F. Thomas, Lee W. Troutfetter, C. A. Talley, Clare B. Tefft, W. E. Tulley, J. H. Uptegrove, Arthur B. Van Buskirk, A. M. Van Donser, R. R. Veldman, E. H. White, Arthur L. Winn, Jr., C. E. Widell, Elmer Westlake, E. S. Wortham, J. K. White, A. C. Welsh, Frederick H. Wood, George E. Winters, William N. Webb, Edgar N. Wrightington, L. F. Weber, H. W. Wise, T. H. Wilson, Sheldon E. Wardwell, Leo F. Wormser, R. S. Waterbury, Warren H. Wagner, Wallace H. Walker, S. H. Williams, F. M. Wintermute, C. H. Winslow, E. L. Wilkerson, J. W. Watson, Chester L. Whittemore,
27 Luther M. Walter, Charles H. Woods, and C. F. Young for various industries and associations.

REPORT OF THE COMMISSION

By the Commission:

This is an investigation upon our own motion into practices of carriers affecting operating revenues or expenses, which for convenience was divided into different parts. Part II, being the instant part, relates to terminal service of Class I [1] carriers by railroad subject to the Interstate Commerce Act. It does not deal with allowances or divisions to industrial common carriers. Hearings were held at convenient points throughout the country. The record comprises evidence presented by carriers and shippers, and data

[1] Carriers having annual operating revenues above $1,000,000.

called for by questionnaires. A proposed report was prepared by the director of our Bureau of Service, to which exceptions were filed by numerous parties, and the case was argued orally. The proposed report dealt with the practices at many individual industries. We will herein deal only with the legal questions and general situations presented. Separate reports will be issued covering the industries either individually or by groups.

Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at
28 such further hearing. The principal questions to be determined, as indicated in the later notices, are as follows:

1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform. This question relates to three distinct methods of rendering such services, including:

Group A, where the industries perform these services and receive compensation therefor from respondent carriers.

Group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers, and

Group C, where respondent carriers perform the services at the special convenience of the industries.

2. Whether, in circumstances where such services are performed by the industries, any allowances made to the industries by connecting common carriers as compensation for such services, are lawful; also why, in similar circumstances, no allowances are made to other industries for performing such services.

The service rendered in placing cars on and removing them from team tracks and private sidings is well known. It consists of the placing of cars at or their removal from a point on such
29 tracks reasonably convenient to both the carrier and the shipper. A description of the service involved on tracks of individual industrial plants will be dealt with in subsequent reports, but in general it may be stated as follows: The industries heard on this record have systems of tracks within their plants which vary in extent from a few tracks aggregating only a few hundred feet in length, to extensive systems many miles in length. These industries are served in one of two ways, i. e., inbound and outbound cars are delivered or received by the carriers on interchange[2] tracks which either compose an extensive yard or designated tracks from and to which interchange track the spotting[3] service is performed

[2] By "interchange" yards or tracks, as used herein, is meant the yards or tracks where cars are delivered to or received from an industry by the connecting carrier. In most instances these yards or tracks are on property of the industry.

[3] "Spotting" or spotting service, as used herein, is the service beyond a reasonably convenient point of interchange between road haul or connecting carrier and loading or unloading locations on industrial plant tracks.

by locomotives belonging to the industry served, for which service in many instances the industry receives an allowance from the carrier while in other instances such service is performed by the industry at its own expense; or by the other method the spotting service is performed by the carrier. In the majority of such instances the spotting is performed by the carrier at its convenience and without interruption or interference by the industry. In other instances cars are first placed by the carrier on interchange tracks from
30 which they are subsequently moved by a carrier engine or engines assigned to the plant and operating entirely under the direction of the industry and spotted when and as needed by the industry without charge in addition to the line-haul rate or switching charge otherwise applicable. At the latter group of industries the services are substantially the same as at the industries where the spotting service is performed by plant power. This report will principally deal with the class of industries to which an allowance is paid by the carrier as compensation for rendering service which it is urged is within the obligation of the carrier under the line-haul rate, and those to which the carriers assign power to perform the spotting service. Many industries own and operate their own power in conducting the industrial operations and in the movement of cars in intraplant [4] service, for which latter service a charge would be collected if performed by the carriers. The industries are thus able to perform all switching service within their plants and coordinate the different services and avoid interference with their industrial operations to a greater degree than would be possible if the connecting carriers performed a part of the switching. Many plants are served by two or more carriers, and in such cases confusion between the carriers and interference with the industrial operations would result if locomotives of the carriers and the industry were switching within the plant at the same time. Very often the industrial operations
31 do not require the entire time of a locomotive, which, however, must be kept available. If the idle time can be employed in performing a service which the carriers can be induced to pay for, a clear gain accrues to the industry. For these reasons the industries prefer to use their own locomotives and, in general, endeavor to secure an allowance for performing the spotting service.

Numerous other industries heard on this record use locomotives for the identical purposes and in the same manner, but receive no allowance therefor, although many of them have made attempts to secure payment for such services. Regardless of the carrier's duty or obligation, in all cases the industrial operations must have primary consideration, and for this reason many industries which have not sought, or have failed to receive, allowances prefer to operate their locomotives to avoid interference with plant operations, and no greater service is performed by the connecting carriers than delivering and receiving cars at convenient interchange points.

[4] Such movements as the plant requires in carrying on its operations and are not related to the delivery or receipt of cars.

The published tariffs generally establish switching limits at the various destination points. Delivery within those limits is paid for when rates are collected to those destinations. In some cases the switching limits are definitely defined by boundaries, and at others the industries included within the switching district are named. There is no dispute that delivery at the various industries is covered by the published rate. The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no
32 inflexible formula can furnish a solution for that problem. The limitation of place within which delivery is due will vary with varying conditions. All that we can safely say is that there must be such a delivery as is customary and reasonable. Delivery by railroad is usually effected either at freight houses or other terminals, and deliveries are still made at such places where the factories and warehouses of shippers and consignees do not connect with the tracks. Private sidings have become common and freight is carried over them between the railroad and the plant. Such carriage is commonly regarded as a part of the work of transportation. In most cases the distances are short and the carrier's burden remain substantially the same whether the cars are left upon the siding close to the main tracks or hauled along the siding until they reach the plant. In such circumstances it may be said with reason that delivery at the plant means delivery at the platform for loading and unloading. The respondents have not withheld service incidental to carriage between the railroad and the plant. Cars have been hauled from the main line to agreed interchange tracks either within the limits of the plant or on tracks in close proximity thereto. These interchange tracks correspond to the spurs or sidings on which the practice of spotting had its origin. What many of the industries here insist upon is that the respondent must haul them farther over an intricate system of interlacing tracks and distribute them among the mills and warehouses not at the convenience of the respondents but in order to meet the industrial needs of the plant. We
33 come then to the test, which, vague as it is, is the only safe one, that is, whether in the light of all the circumstances such a form of delivery is customary or reasonable. That it is not customary is established, we think, by uncontroverted evidence. Spotting cars upon short and direct sidings is a service that has little kinship to intricate maneuvers designed not to reach the industry but to permit the convenient distribution of wares among the subdivisions of the industry. The difference may be one of degree but here as is so often in the law such differences are vital. In many cases shown upon the record the complicated shifts and transfers are made by shippers or consignees within their own plants at their own cost and without an allowance from the carrier.

The tariffs publishing the line haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction

provide for "plant switching" or "spotting of cars at unloading point" to be performed at plant's convenience.

During the period of years in which we have considered allowances, many cases dealing with spotting services, allowances to industries, and so-called plant facility railroads have been considered. Counsel of record filed a brief listing 164 cases which we have decided, and several have been decided since that brief was filed. Many of these cases dealt with allowance or divisions of rates to industrial common carriers, which are not discussed herein. A number of these, such as the Industrial Railways Case, 29 I. C. C. 212,
34 The Tap Lines Case, 23 I. C. C. 277, and others, were considered on voluminous records. Rules have been promulgated by various carrier associations, for the guidance of the carriers in the granting of allowances, but being without binding force upon any individual carrier, they have been largely disregarded.

About 1920 a special committee of carriers operating in official territory made a study of the practices in that territory with respect to the spotting service. This special committee reported that the practices were irregular and inconsistent and demanded a remedy. The committee believed that the formula by which the allowances were computed was incorrect, and resulted in unjustified expense to the carriers. It recognized that much of the service for which allowances were paid was service which was in excess of the carrier's obligations under their line-haul rates and proposed that a tariff be issued for account of the carriers in that territory. The proposed tariff contemplated that simultaneously all tariffs providing for allowances to industries for terminal service in spotting cars should be canceled, and it was stated: "The effect of such tariff would tend to reduce the amount of switching at present being accorded by carriers in spotting cars, which, as pointed out by the Commission in the U. S. Cast Iron Pipe & Foundry Company decision, is *in excess of their obligations*." (Italics supplied.)

The proposed tariff provided that where spotting service could not be performed on private or industrial sidings by means of one simple switching movement, a uniform charge should be ap-
35 plied for the remainder of the service; and that where an industry performed spotting service which was properly a carrier's duty, an allowance in an amount uniform to all such industries might be paid.

Due mainly to the opposition of the National Industrial Traffic League, the proposed tariff was never published. This record shows that the irregularities, inconsistencies and demand for remedial measures, which were found by the special committee to exist, still exist, and have since then greatly multiplied. As late as March 1931 the eastern carriers were attempting by change in their formula to obtain uniformity, and in August of that year one of the largest eastern railroad systems declined to grant an allowance to a certain industry solely on the ground that it was not an iron and steel industry, although at that time and for a number of years previously this

system and its component lines had been granting allowances to many industries regardless of the nature of their business.

The futile efforts of the carriers in the past to obtain uniformity, and to limit allowances to services which are properly a part of their duty, offer no ground for belief that future efforts on their part will accomplish such objectives. That such conditions exist was recognized by the Congress in section 2 of the Emergency Railroad Transportation Act, 1933, wherein it is stated that "in order to foster and protect interstate commerce in relation to railroad transportation, by preventing and relieving obstructions and burden thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of trans-
36 portation," the office of Federal Coordinator of Transportation was created. Section 4 provides that one of the purposes of that act is to control allowances, accessorial services, and the charges therefor, and other practices affecting service or operation to the end that undue impairment of net earnings may be prevented, and other wastes and preventable expense avoided. That emergency act in no wise affected our power with respect to the practices involved in this proceeding. It emphasized, however, the necessity for this investigation which we had previously begun. Before dicussing the general testimony, it may be helpful to consider the applicable legal principles as announced in the decisions of the courts and this Commission.

DISCUSSION OF THE APPLICABLE LAW

Section 1 (3) of the Interstate Commerce Act defines "transportation" to include all services in connection with the receipt and delivery of property transported, and paragraph 4 of the same section makes it the duty of common carriers to provide such transportation upon reasonable request therefor at just and reasonable charges. The carriers are not only entitled to reimbursement for the cost of rendering the service and a reasonable profit, Southern Ry. Co. v. St. Louis Hay & Grain Co., 214 U. S. 296, but it is unlawful for them to transport property free, except pursuant to law. American Exp. Co. v. United States, 212 U. S. 522; Louisville & N. R. Co. v. United States, 282 U. S. 740.

Whatever transportation service or facility the law requires the carriers to supply they have the right to furnish. Atchison,
37 T. & S. F. Ry. Co. v. United States, 232 U. S. 199. A carrier may, however, employ an agent to perform transportation service for it. United States v. Fruit Growers Express Co., 279 U. S. 363. And a carrier may receive services from an owner of property transported or use instrumentalities furnished by the latter in which cases the carrier shall pay for them subject to the restriction that the compensation be no more than is reasonable. United States v. Baltimore & O. R. R. Co., 231 U. S. 274. These principles should be kept in mind in considering the discussion which follows.

Over a period of many years the courts and this Commission have had numerous occasions to consider the services which the carriers are obligated to render for the compensation they receive in the form of the line-haul freight rates. In Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co., 18 I. C. C. 310, 314, we said:

"The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery."

In that case the attack was made upon the charge of $2.50 per car made by carriers at Los Angeles, Calif., for delivering or receiving carload freight at industries located upon spurs or side tracks within their switching limits, when such carload freight was moving incidental to a line haul and the carrier receiving or delivering such freight received the whole or any part of the compensa-
38 tion for such line haul. In discussing the facts we pointed out that freight moving in carloads was delivered at team tracks, at freight sheds, or at industry spurs, and that at team tracks and freight sheds no charge was imposed for the receipt or delivery of such carload freight over and above the freight rates named in the tariffs, while at industry spurs an additional charge of $2.50 was imposed on every loaded car moving in or out. We said further:

"These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood."

In finding that the charge was illegal and unjust, which decision was upheld by the Supreme Court in the Los Angeles Switching Case, 234 U. S. 294, we said that the industrial spurs under consideration were of a totally different character and of a different nature from those considered in Chicago & A. Ry. Co. v. United States, 156 Fed. 558, Solvay Process Co. v. Delaware, L. & W. R. Co., 14 I. C. C. 246, and in General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237.

In the last case the General Electric Company asked that we determine and fix the just and reasonable sum that it might charge the carriers for services performed and instrumentalities furnished by it in connection with the interstate movement of its own property. The instrumentalities referred to were complainant's storage
39 tracks which it had constructed, and the locomotives and electric motors which it owned and operated within the limits of its extensive plant at Schenectady, N. Y. The services which the industry claimed to perform consisted of handling the loaded or empty cars between the storage tracks where the cars were interchanged with the carriers, and the various shops, foundries, and

other buildings where cars were ordinarily unloaded or loaded. Complainant asserted that its activities and equipment with respect to such movements were services directly rendered and instrumentalities furnished by it in connection with the transportation of its own property within the meaning of section 15 (13) of the Act; and that it ought to have reasonable compensation therefor from the carriers. We said at page 242:

"The real question before us is whether complainant, under the amended act to regulate commerce, may lawfully make any charge and demand any compensation from the defendants upon the facts shown of record. Is the service performed by it a carrier's service? Is it a part of the transportation undertaken by the carrier? Or is it a shipper's service—something apart from the transportation, and which is done by the shipper for its own benefit?

"To that question we have given such thought and reflection as its importance demands, and our conclusion is that the handling of the cars by complainant within the inclosure of its plant has not been shown to be a carrier's service—something done by the
40 complainant which the carrier ought to do as a part of its contract of transportation—but that the storage tracks and switch tracks and all the arrangements and facilities for moving cars within its plant inclosure are for the complainant's own convenience and are necessary to the economical conduct of its business.

"While the defendants now spot cars within the switching districts of cities and towns on their respective lines, such service amounts practically to no more than placing the cars upon sidetracks. The switch tracks leading to industries served by the defendants in the great majority of cases are from 400 to 500 feet long. In all cases the defendants reserve the right to use such tracks for storing cars when that can be done without inconvenience to the industries to which they lead. And at all times both companies reserve the further right to pass over such tracks to make deliveries to industries beyond. There is, therefore, in a measure a joint ownership of the tracks or a joint right in the use of them, and to that extent they may be said to be system trackage. It is on such tracks that the defendants customarily spot cars free of charge. With an engine already coupled to a car, it involves no appreciable additional cost and no appreciable delay to put the car at the leg of an elevator or at the door of a warehouse instead of merely running it onto the sidetrack far enough to clear the main line. And such switching can be
41 done at the reasonable convenience of the carrier. But here we have within the complainant's inclosure an elaborate system of broad-gauge switching tracks 12 miles in length operated both by steam and electric power and a narrow-gauge system 7 miles in length operated by electricity only; and on both systems a very extensive, purely internal switching is conducted by the complainant with its own motive power and crews. The defendants have no right to make any use of those tracks. They are not system tracks even in

the qualified sense above mentioned, but are the exclusive tracks of the complainant. And the switching can not be done by the defendants at their reasonable convenience and whenever an engine is at hand to do it, but only at such time and in such manner as will not interfere with the complainant's switching engines and crews. In our judgment, in such cases a carrier has performed its full duty under its contracts of transportation when it delivers or accepts cars at some reasonably convenient interchange point, such as the storage tracks heretofore described that were constructed for that purpose by the complainant."

The matters there in controversy before us were litigated anew in *New York Central & H. R. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115. In its opinion the Court of Appeals of New York at pages 117 and 118 said:

"The decisive question must therefore be whether the switching done by the defendant within its plant between the storage
42 tracks and the platforms of its mills is work that the plaintiff was bound to do as a part of transportation. To put it in another form, the question is, Where does transportation begin and end? The published tariffs to Schenectady establish switching limits extending from Sandbank to Carmen and Stony Lane. Delivery within those limits is paid for when rates are collected to Schenectady. Since the limits embrace the defendant's plant, there is no dispute that delivery at the plant is covered by the rate. The difficult thing is to ascertain when delivery at the plant is made.

* * * * * * *

"* * * Industrial spurs, within the switching limits designated by the carrier, are to be regarded, indeed, for many purposes, as an extension of the terminals. Los Angeles Switching Case, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed. 1319. But reasonable delivery does not involve the carrier's co-operation in the division of labor and of functions between the sections of a gigantic plant. This network of tracks is and must be under unified control. Order and method must reign. * * * The engines that move within this plant are not doing work that the plaintiff ought to do, or effectively could do. They are doing the defendant's work. They are 'plant facilities.'"

The Court had earlier said at page 117:

"Transportation includes delivery. Under the plaintiff's published tariffs it does not include the work of loading and
43 unloading. Official Classification, 38, Interstate Commerce Commission. But whatever is essential in order to complete delivery, the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; United States v. B. & O. R. R. Co., 231 U. S. 274, 293, 34 Sup. Ct. 75, 58 L. Ed. 218. But no allowance is due

for service rendered by the consignee after delivery has been made and transportation is at an end An allowance in such circumstances would constitute an unlawful rebate. That is true of interstate shipments under the laws of Congress. Act to Regulate Commerce (Feb. 4, 1887) 24 Stat. L. 379, Secs. 2, 3, 17; Act of Feb. 19, 1903, 32 Stat. L. 847; Act of June 29, 1906, 34 Stat. L. 584. It is true of intrastate shipments under the laws of New York. Public Service Commissions Law (Laws 1907, c. 429), secs. 31, 32."

The distinction between plant facilities and true agencies of transportion has been expressed by us in numerous decisions. Thus in Brimstone R. & Canal Co. Excess Income, 189 I. C. C. 437, decided January 27, 1933, Division 1 said at page 455:

"It is the carrier's contention that the switching from the hold tracks to the loading tracks and vice versa, is a common-carrier operation performed by it as a part of its transportation
44 obligation and is comprehended within the rate division received by it. On the other hand, our interested bureaus contend that those switching operations are conducted for the convenience of the sulphur company and that the costs thereof should be allocated to plant expenses and not to carrier operating expenses. The evidence in this case, so far as these tracks and operations thereover are concerned, is substantially the same as that considered by us in Divisions Received by Brimstone R. & Canal Co., 88 I. C. C. 62, 69, where we said:

" 'Where the facilities of an industry are so constructed that delivery at its plant is rendered impracticable, the duty of the carrier is fulfilled if it holds itself out to receive and deliver on a convenient interchange track. General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237. The service of the proprietary company—(Union Sulphur Company)—in moving cars from the storage tracks to the sulphur bins and returning such cars, loaded, to the storage tracks, is no part of the common-carrier operations of the Brimstone.'

"We reaffirm that conclusion, and hold that the storage or hold tracks were facility used as a convenience of the sulphur company; that the delivery of inbound empty cars thereon or on the loading tracks terminated the common-carrier obligation of the carrier
45 so far as inbound empties were concerned; that on outbound shipments of loaded cars the common-carrier transportation commenced only when the cars were delivered to the carrier for final movement to destination; that the intermediate switching between the hold tracks and the loading tracks was a plant service; and that the expense of such switching should not be included in railway operating expenses. In arriving at th conclusion we have not overlooked our decisions in other case ited by the carrier, which we find clearly distinguishable on the f.cts as well as on principle."

The question whether or not there is an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether this is merely a substituted service, which

is substantially a like service to that included in the line-haul rate, is a question of fact to be determined in each case.

We have considered many cases involving the question of allowances under section 15 (13) to shippers for instrumentalities and services rendered in connection with the handling of cars to, from, and within industrial plants. The decisions in most of those cases did not go to the merits of the allowances, as such, but were founded upon the provisions of either section 2 of the act prohibiting unjust discrimination, or section 3 of the act, prohibiting undue prejudice or preference. The findings in Allegheney Steel Co. v. Director General, 60 I. C. C. 575, 578, may be taken as typical of the findings in such cases. We there said:

46 "The facts of record are not deemed such as to support a finding of unreasonableness, but we find that in respect of interstate carload traffic moving between the trunk line and loading and unloading points within the limits of complainant's plant, the failure of the defendants to perform the switching and spotting service with their own motive power, or to make an allowance to complainant covering the cost of that service performed by it does and will for the future subject complainant to unjust discrimination as between it and similarly situated competitors in the Pittsburgh rate district for whom such services are performed by the defendants without additional charge or to whom allowances are made for the performance thereof."

It was left to the discretion of the carriers to determine how the unjust discriminations or undue preferences were to be removed, and they generally complied by granting allowances to the complaining industries. These cases are therefore of little or no assistance in considering the broad question whether the services performed by the industry and for which an allowance is paid by the connecting line are, as a matter of fact, transportation services which the carriers are obligated to perform, or whether such services are plant services.

In a relatively few cases the question of such allowances has been considered upon its merits. In United States Cast Iron P. & F. Co. v. Director General, 57 I. C. C. 677, the industry sought an increased allowance for spotting cars within its plant. In the course of its

47 opinion, holding that the propriety of an increased allowance had not been demonstrated Division 2 at page 681 said:

"A carrier is ordinarily under a legal obligation to effect delivery under a transportation rate. The nature and extent of delivery of carload traffic has differentiated with the increasing complexity in the development of industrial enterprise. Perhaps the most common, if not the standard, form of delivery for carload freight is the setting of a car on the so-call d team tracks of the carrier, where it may be conveniently unloaded, usually by the consignee. Another common form and a substitute for team-track delivery is the switching of a car to the private siding of a consignee whose place of business is contiguous to the trunk line, clear of the main track. It

is indisputable that the trunk line carrier may be required to perform these or equivalent services of delivery without charge in addition to the transportation rate, or, if it choose, may employ an agent to render the service for it. This agent may be the shipper or owner of the property transported, with the limitation that the charge or allowance for the service may be no more than just and reasonable.

* * * * * * *

"Switching allowances to large industries have developed in certain parts of the country until in many instances they are little better than undue preferences, and represent service which we would, ab initio, long hesitate to direct a carrier to render in effecting
48 delivery of carload freight. They are, without doubt, frequently compelled by the fear of loss of large tonnage; they deplete unnecessarily the revenues of the carriers and thus tend to shift the burden of paying for such expensive deliveries from the shoulders of the recipients, where it belongs, to the shoulders of other shippers, who receive only average delivery service."

This case was cited with approval and followed in Lehigh Portland Cement Co. v. Director General, 62 I. C. C. 231, Whitaker-Glessner Co. v. B. & O. R. R. Co., 63 I. C. C. 47, and Terminal Allowance to St Louis Coke & Iron Co., 85 I. C. C. 591.

In Columbia Mills *v.* Delaware, L. & W. R. Co., 118 I. C. C. 112, Division 1 found that the failure or refusal of the carrier to compensate complainant, out of the line-haul rates, for the services performed by the latter in switching carload shipments between points within its plant and the point of interchange with the carrier, and in checking, weighing, loading, and unloading less-than-carload shipments delivered to or forwarded from the plant in trap cars, was not shown to violate any provision of the act.

On behalf of the National Industrial Traffic League and others, it is urged that the decision in Car Spotting Charges, 34 I. C. C. 609, should be regarded as finally decisive upon the proposition, that freight rates cover the entire transportation service; and that the so-called spotting service is included in the line-haul rate by practice and custom and under legal decisions. This case was de-
49 cided July 6, 1915, and that it is not finally decisive of the various questions presented in the instant proceeding is demonstrated by the many decisions rendered upon similar questions during the 20 years which have intervened. In that case we considered the propriety and reasonableness of a tariff charge for placing cars upon industry spurs or private sidings, or upon the tracks of industrial plants, at convenient points for loading and unloading, and for the movement incident thereto, over the track or tracks of the industry. As defined in the suspended tariffs there under consideration, the charge was to cover the following service:

"'Spotting'" or spotting service, as used herein is the service beyond a reasonably convenient point of interchange between road haul or connecting carrier and industrial plant tracks, and includes:

"(a) One placement of a loaded car which the road haul or connecting carrier has transported, or

"(b) The taking out of a loaded car from a particular location in the plant for transportation by road haul or connecting carrier.

"(c) The handling of the empty car in the reverse direction."

The industries to which the charge was to be applied were divided generally into three lists: (1) industries having industrial plant tracks connecting with the tracks of the carriers on which industrial tracks the carriers had performed spotting service in the past, and upon which they would, if desired, have continued to perform such service on and after the effective date of the tariff at the
50 charge provided therein; (2) industries having industrial plant tracks connecting with the tracks of the carriers upon which industrial tracks the industry had performed the spotting service in the past. The charge of the carriers for performing spotting service for the industry on its plant tracks connecting directly with the tracks of the carriers would have been as per the tariff in question provided the performance of the service by the carriers was shown to be practicable and was agreed upon. The third was a list of industrial railways and provided that spotting service on or over the tracks of those railways could be performed only by special agreement.

As we pointed out, in general, the industries were arbitrarily selected, and ranged from the ordinary mill or factory with a single spur or private siding to the large iron and steel industries having an interior system of rails called the plant railway. On page 616 we referred to our finding in the *Los Angeles Switching Case*, *supra*, that where the service was merely a substitute for team-track receipt and delivery the line-haul rate covered the service for the reason that rates generally in this country had been constructed upon that basis. We then stated:

"The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated
51 industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries. At the large industries the trunk line may render interplant services in the movement of cars from place to place within the plant during the processes of manufacture which it has no occasion to render at smaller industries, and for such services an additional charge should be made; but where the service rendered is merely a substitute for the service which would be required if the movement were to or from a team track, an industry spur, or a private siding, nothing should be added to the charge for the line haul."

On page 618 we said:

"There may be cases in which the spots at which cars are placed for loading and unloading in complex industries are so located that the request for the receipt and delivery of carload freight at such spots could not, in view of general usage, be regarded as reasonable, and where a charge for the spotting service in addition to the line-haul rate might therefore be justified, but the mere fact that an industry is complex, or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at
52 the door of the industrial plant for the receipt or delivery of carload freight. The line-haul rate, however, covers only one placement of the car for loading or unloading, and an additional charge should be made for each additional placement of the car for that purpose."

We found that respondents had not justified the tariffs under suspension but stated:

"The respondents may, however, file new tariffs, providing for spotting charges in those instances in which the terminal services performed exceed the services which under established custom is, (sic) or should be, performed for the line-haul rate, in accordance with the views expressed in this report."

The carriers took no action to comply with our findings other than to cancel the tariffs under suspension.

The Car Spotting Case should be considered in connection with the Second Industrial Railways Case, 34 I. C. C. 596, which was decided five days before the former case and immediately precedes it in the bound volume. In that case we divided the industrial operations into six groups. Our discussion of the last of these groups, appearing at pages 607–8, is particularly pertinent here. We said:

"The sixth group is composed of industrial plant tracks which are neither owner nor operated by common carriers and are not dedicated to public use, the ownership and right of use *being in the* controlling industries which operate them. They ask that
53 allowances be paid them out of the locality basis of rat[illegible] under section 15 of the act, upon the theory that they are performing a service of transportation which the trunk line is obligated to perform under the rate structure. This question was considered in the General Electric Co. and Solvay Process Co. c[illegible] supra, and it is not necessary to enlarge upon it here. These cases illustrate the passing of the necessity for that provision of section 15 under which shippers may be compensated by the trunk lines for their facilities used in the handling of their own shipments. This legislative measure was enacted to give this Commission the means of eliminating certain unjust discriminations. The gradual elimination of discriminatory practices by other processes leaves this provision of the law to be used as a cloak for various payments which but for it would be looked upon as rebates."

Certainly, it cannot be said that we have found that the transportation service which a carrier is obligated to perform under a line-haul rate includes the placement of the car at the point of loading or unloading in all instances and under all circumstances.

It is also urged that the statement of the court in New York Central & H. R. R. Co. v. General Electric Co., supra, that "a railroad's duty to carry is a duty to carry over its right of way" is diametrically opposed to the Supreme Court's conclusions in Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, and in Mitchell
54 Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247. We do not agree that this is correct. The service involved in the Diffenbaugh case was that of elevation, and the court held that "As the carrier is required to furnish this part of the transportation upon request, he (Peavey)[5] could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable, and it is admitted that three quarters of a cent barely would pay the cost of the service rendered without any reasonable profit to Peavey & Company for the work." In the Mitchell case, the court said "to pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot", and it said further "Inasmuch as this rate included the haul the Railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor." There is no conflict between the language of the Court in the General Electric case and the Diffenbaugh and Mitchell cases.

In National Industrial Traffic League v. Aberdeen & R. R. Co., 61 I. C. C. 120, 123, we said:
55 "The demands upon a carrier which lawfully may be made . . . are limited by its duty. Gt. Northern Ry. v. Minnesota, 238 U. S. 340, 346. But it is not its duty as a common carrier to enter into a contract to lease a railroad siding to a shipper or to enter into an agreement to operate privately owned sidetracks. The liability clauses complained of do not involve the question of rates, nor the matter of facilties to be furnished by the railroad company for the transportation of property under its obligation as a common carrier, and section 1 does not confer upon us the power to pass upon liability clauses of leases or of agreements for the maintenance, use, and operation of such individual sidetracks."

---

[5] Parenthetical insertion ours.

And in American Fuel Co. v. Atchison, T. & S. F. Ry. Co., 123 I. C. C. 101, 112, we said:

"Service over private tracks or plant-facility tracks by a common carrier subject to our jurisdiction is neither compelled nor prohibited under the interstate commerce act. To furnish it or withhold it is within the discretion of the carrier. In either event the statutory inhibition against unjust discrimination or undue prejudice must be observed. Moreover, where, as here, the defendants have elected to perform the service they should publish tariffs to cover it."

To the same effect are the decisions in Transfer in St. Louis and East St. Louis by Dray and Truck, 155 I. C. C. 129; King
56 Stone Co. v. Chicago, I. & L. Ry. Co., 160 I. C. C. 245; and Winnsboro Granite Corp v. Southern Ry. Co., 176 I. C. C. 481.

If a carrier operates over private industrial tracks it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes. The payment by the carrier to a shipper for rendering services upon private tracks which are not contemplated by the charges of the carrier would be "a gift—a rebate—a thing ipso facto illegal and prohibited by the statute" * * *. Mitchell Coal & Coke Co. v. Pennsylvania R. Co., supra. Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6 of the act. American Exp. Co. v. United States, supra; Louisville & N. R. Co. v. United States, supra.

As previously stated, whatever transportation service or facility the carrier is required to supply it has a right to furnish. Atchison, T. & S. F. Ry. Co. v. United States, supra. When a carrier is prevented from performing the service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line haul rate is discharged, and there is no obligation resting upon it to make
57 an allowance to the industry for performing the service. Allowances to Texas Gulf Sulphur Co., 96 I. C. C. 371.

When a shipper seeking an allowance for performing a carrier service within its plant makes no demand of the trunk lines for performance and the carriers could not perform such service with available equipment because of excessive track curvature, any inequality which occurs because the shipper's competitors receive for the line-haul rate a service similar to that for which it requests an allowance is due to the position which it has assumed rather than to undue prejudice which the carriers could be required to remove. United

States Cast Iron Pipe & Foundry Co., Inc. v. Director General, 62 I. C. C. 339.

If the shipper, for its convenience, prevents the carriers from performing the final placement of cars by a single movement, the carriers need not absorb the costs of switching from points of interchange to points of placement within the plant, when performed by the shipper. Marting Iron & Steel Co. Case, 48 I. C. C. 620.

No legal obligation rests upon a carrier to perform switching and spotting service solely at a shipper's convenience, and a shipper is not entitled to an allowance for these services if the carrier is ready and willing to perform them, but is not permitted to do so by the shipper. Stewart Furnace Co. v. Pennsylvania R. Co., 68 I. C. C. 528.

In the Industrial Railways Case, supra, we found and concluded with respect to certain industries listed on pages 236 and 237, that

58 all the service by the line-haul carriers beyond a reasonably convenient point of interchange between the rails of the carrier and the rails of the industry, either within the plant or without the plant, was a shipper's service and not a service of transportation which the line carriers may perform without charge or may allow for out of the rate through divisions or otherwise when performed by the industry or by its industrial railroad, and that the facilities used by the industry in performing these services, whether separately incorporated or not, were plant facilities and plant equipment. We concluded and found that the delivery of a car by a line carrier upon the interchange track was a delivery to the industry, that the line carriers were not compensated in their rates for services beyond that point, and that the allowances therefor were unlawful rebates paid for the traffic, and when performed by the line carriers were unlawful rebates in service, paid for a like purpose. In the supplemental report in that case, 32 I. C. C. 129, which followed the decision of the Supreme Court of the United States in the Tap Line Cases, 234 U. S. 1, we modified our findings in the first report with respect to industrial common carriers so as to comply with the decision of the court. There is nothing in the supplemental report which overrules in any particular the findings in the first report with respect to the payment of allowances to industries for performing their own plant service. In fact, we stated that:

"* * * The General Electric Company case, supra, the Solvay

59 Process Company case, supra, and the Crane Iron Works case, 17 I. C. C. 514, were decided upon the facts, circumstances and conditions appearing in connection with each. Those cases, however, differed from the Tap Line cases and from the instant case in that in each of the former cases the industrial railway, or the industrial corporation which in fact or effect owned it, sought to have us require the trunk line roads to accord the industrial roads allowances or divisions which the trunk line roads were unwilling to accord and which they contended would be unlawful."

We then stated:

"We think that in the light of the decision of the Supreme Court in the Tap Line cases it is our duty to so modify our findings in the original report herein as to permit the trunk line roads, if they so elect, to arrange by agreement with any of the industrial roads mentioned in our former report which are common carriers under the test applied by the Supreme Court in the Tap Line cases, and which perform a service of transportation, for a reasonable compensation for such service in the form of switching charges or divisions of joint through rates."

In the Second Industrial Railways Case, supra, we said at page 601:

"If the service in any instance is a plant service the trunk line carriers can not lawfully compensate the shipper itself, or indirectly through its incorporated plant railroad, for the use of its plant tracks or for switching the shipper's cars over them with its own motive power."

60 In Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., Inc., 270 U. S. 260, the Supreme Court in affirming the opinion of the Supreme Court of Appeals of Virginia, 138 Va. 647, 123 S. E. 352, stated:

"The service of spotting cars was included in the line haul charge under both interstate and state tariffs."

It is urged on brief and exceptions that this expression of the court is conclusive in all cases that the service of spotting cars is included in the line-haul rate. The facts as shown by the decisions of the courts are that during the World War the defendant contractors were constructing embarkation facilities at Newport News, Va. Large quantities of material for use in such construction were delivered by the C. & O. at that point, and there was great traffic congestion in its railway yard. Because of this and other activities growing out of the war, the railway was unable to deliver goods or freight to the contractors within a reasonable time so that the latter's building operations were greatly impeded. To remedy this condition the C. & O. by contract assigned an engine and crew to the exclusive use of the contractors' traffic payment to be made therefor as prescribed in the contract. The contractors later refused to pay for such service and action was brought to recover under the contract. In its decision the lower court said:

"It is perfectly clear under the tariffs on file, that the line haul rates on these cars entitled the consignees to have them 'spotted' or placed upon these private delivery sidings to be
61 unloaded. As expressed by the witness Ford, the consignee was entitled to *one placement of the car on a track agreed* upon by the railroad and the party owning the commodity, which would either have to be a general delivery, public delivery you might say, or private industrial siding. That this expresses the true construction of the applicable rate which was published and filed is conceded." (Italics ours.)

Comparison was made by the Supreme Court of the service covered by the C. & O. tariff, with that considered in Car Spotting Charges, supra, and in Downey Ship Building Corp. v. Staten Island Rapid Transit Ry. Co., 60 I. C. C. 543. In the Downey case Division 2 at page 547 defined the carrier's obligation as involving "only one placement of a car and the movement to be made without interference and over the trackage suitable for the service."

The Supreme Court further stated:

"The service by special engine and crew contracted for and given was not spotting solely for the convenience of the shipper. It was the spotting service covered by the tariff. * * * The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act. * * * A contract to pay this additional amount is both without consideration and illegal. * * * To so assure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground."

62 Expressed differently, it would be unlawful for a carrier to contract to perform a preferential service. There is nothing in the decision of the court to indicate that the service contemplated by the line-haul rate was in excess of simple switch placement or in excess of team-track spotting. We think it is beyond question that by the operation of their own locomotives with payment therefor by respondents, or by the assignments by respondents of engines and crews for the exclusive service at specified industries heard on this record, such industries secure a superior and preferential service, and one which is not afforded by the carriers in the performance of ordinary operations to shippers who neither own nor have locomotives assigned for their exclusive use. See Riter-Conley Mfg. Co. v. Director General, 58 I. C. C. 327, 330.

Nor can it be overlooked that there is a financial gain to industries which utilize their own locomotives in securing for themselves this superior convenience regarded by the Supreme Court as a preferential service. In the practical application of the carrier's rules for determining the amount of allowances to industries, it must be understood that in making cost studies at the plants herein considered the locomotive service is performed in a manner most convenient to industrial needs. As many movements are made between the interchange tracks and the points of unloading or loading as the industrial operations require, and the number of engine hours devoted to this service is taken into account in determining the cost to the industry upon which the allowance is based. Respondents pay

63 for such service to the advantage of the industry from both a financial and a service standpoint. The assignment of locomotives by carriers for use by industries under the latter's direction and control likewise results in a superior convenience and preferential service.

To summarize it is well settled that carload freight may be delivered or received by carriers upon a private industrial siding. Under general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed upon by him and the carriers. See Chesapeake & Ohio Ry. Co. v. Westinghouse, Church, Kerr & Co., Inc., supra, the case affirmed by it, and cases cited therein. See also Industrial Railways Case, supra. It is likewise clear from these same authorities that service beyond such reasonably convenient points is not a service which the carrier is obligated to perform or pay for under its line-haul rates.

Section 6 (7) provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates fares and charges which are specified in the tariff filed and in effect at that time." A further provision is that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation
64 of passengers or property except such as are specified in such tariffs."

The statute prohibits every method of dealing by a carrier by which it directly or indirectly charges less than the published tariff rates. In the absence of a tariff provision, for a carrier to assume under its line-haul rates an obligation which is not properly includible under such rates is clearly in violation of section 6 of the act, and necessarily preferential. As said in Davis v. Cornwell, 264 U. S. 560, citing Chicago & A. R. Co. v. Kirby, 225 U. S. 155: "It was not necessary to prove that a preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference."

VARIOUS ATTITUDES OF CARRIERS WITH RESPECT TO ALLOWANCES

For about 25 years we have considered cases involving the payment of allowances to industries for the performance of their terminal switching. The earlier cases involved industries in the eastern industrial sections, and allowances gradually became more numerous in that part of the country until about 1915. Their spread in Pennsylvania and Ohio was more rapid after the end of Federal control. In 1921, the first important allowance was granted in the Illinois-Indiana industrial region, and others rapidly followed extending into the lower part of the Mississippi Valley west of the river where allowances had previously been made to certain lumber companies as a result of the Tap Line Case, supra. Some allowances have
65 been granted in the north central and extreme northwest sections and at present the only sections of the country where allowances are not paid are New England, the Southeast and the extreme Southwest.

The New England carriers maintain the position that allowances are improper; that if an industry specifies a yard or location where cars are to be interchanged, the placing or receiving of the cars at such location constitutes delivery or receipt by the carrier under its line-haul freight rates; and that a further movement by industrial locomotives is a matter of internal arrangements of such industry and is no concern of the carrier.

Nearly all of the carriers south of the Potomac and Ohio rivers and east of the Mississippi have from the beginning resisted the payment of allowances. One of the vice presidents of a large southern carrier stated the position of his company with reference to such payments substantially as follows: Speaking of a steel plant that had grown from a small industry through many years' operation, to a large industrial plant, he explained that in the beginning, the plant had required only a small amount of switching, which was then performed by carrier locomotives. The growth of the industry later required the constant service of one, then three locomotives which were operated and controlled by the industry. At the time the constant service of the first locomotive was required for the plant's needs, the carrier considered its obligations under the line-haul rates ended when cars were interchanged at reasonably convenient points and thereafter performed no further service
66 beyond such points. His testimony indicates recognition that a line of demarcation exists between the services included in transportation and those included in the industrial operations of a plant, and shows that this line should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant.

The position of this carrier is illustrative of that of the southern carriers generally. By maintaining this position these carriers have largely avoided discrimination, confusion, and the wasteful dissipation of their funds and revenues, which this record clearly shows in many cases result through the performance by carriers without charge of services in excess of their obligation under the line-haul rates or the through payment of allowances to industries when they performed the spotting service.

RULES PROMULGATED BY CARRIERS FOR COST STUDIES

In the earlier allowances there appears to have been no uniform rule or definite formula in general use by the carriers in arriving at the cost to the industry for performing the service for which the allowance was paid. This condition existed until 1915. In Chicago, West Pullman & Southern R. R. Co. Case, 37 I. C. C. 408, 415, decided December 23, 1915, we announced certain principles which should govern in making allowances to industrial common carriers.

67 Following the principles there set forth certain formulas were evolved to compute costs to an industry where it performed the terminal switching service, which eventually were embodied in a printed circular. The first four paragraphs of this circular and the rules particularly pertinent to this report are reproduced as appendix A hereto.

The rules set forth in the circular were exhaustive, providing among other things, for the appointment of committees for the receipt of applications for, and consideration and disposition of, allowances; for conducting cost studies by an accounting committee to determine the proper amount of an allowance; for methods to be used in making such studies, including the apportionment of time to be charged to the carrier or the industry, and the amount to be allowed for interest and depreciation on locomotives provided by industries; and the definition of certain terms, as well as setting forth a partial list of what should be considered as plant interruptions or interferences which terminated the carrier's transportation service. These rules clearly indicate the attempt of the carriers to establish a line of demarcation separating transportation services from industrial services.

Slight variations occur in the various freight associations with respect to the applications for and consideration of allowances. In central territory the industry desiring an allowance makes application to the carriers serving it. This application is referred to the general committee consisting of traffic managers of the carriers embraced in that territory. The general committee places the
68 application in the hands of the terminal allowance committee, which after analyzing the proposal, if nothing is found objectionable, calls upon the accounting committee to make a cost study. The result of the cost study should determine the amount of the allowance to be granted, but in many cases the results of the study have been disregarded. Practically the same procedure is followed in the trunk line association.

Since 1923 the western trunk line association has maintained a similar organization for the handling of allowances, and an additional legal committee to which the proposed allowances are referred for an opinion as to the legal phases involved. In all cases final judgment is reserved for the traffic executive committees of the respective associations should their consideration be necessary. The associations' committees have only recommendatory powers in any case, and the individual carriers affected always retain the right of action in making or failing to make an allowance.

The rules reproduced in the appendix were to some extent later modified, but these modifications will not be described in detail as the record deals principally with allowances made while the methods embodied in the circulars previously described were in force.

69 THE PRACTICAL APPLICATION OF RULES FOR MAKING ALLOWANCES

The first part of paragraph (3) 2 (c) of appendix A reads as follows:

"The Interstate Commerce Commission has held that switching services by a plant facility for account of a carrier must not exceed the equivalent of team track or simple switch placement. If no unusual or marked difficulty of operation in a plant is presented, the service may be considered not in excess of a simple switch."

This part of the paragraph is included in the formula used in western trunk line territory, but the formula of the latter also contains the following sentence: "Any service in addition to that shall be at the expense of the industry."

This rule coincides with our conception of a carrier's duty with respect to the delivery and receipt of freight.

In the formula adopted in eastern territory, but not in that used in western trunk line territory, the following also appears:

"If the plant requires some unusual, complicated, or extensive switching service in comparison with other plants of substantially the same type (but not necessarily of the same output), in the same vicinity, it shall be held that the service is in excess of a simple switch, and no allowance shall be made."

70 A diligent but unsuccessful effort was made to determine from officials of the committees, and other witnesses, the reason for the inclusion of the last sentence in paragraph (3) 2 (c). As written, it is confusing, contradictory with other parts of the same paragraph, and its purpose could not be explained. The preceding sentences in the same paragraph seem to recognize that if unusual or marked difficulty of operation in a plant is presented, the service should be considered in excess of team track or simple switch placement, and the additional service should be at the expense of the industry. The last sentence, on the other hand, holds that even though the service is unusual or of marked difficulty it shall not be considered in excess of team track or simple switch placement when other industries of substantially the same type, in the same vicinity, receive comparable service.

Attention is directed to interruption and interference with the carrier's switching operations due to industrial operations as set forth in rules 6 and 8, and the definition of what should be considered as plant interruption and interference in rule 9. While these rules were promulgated by the carriers for their guidance, they have no binding force, and as shown by this record for all practical purposes they have been disregarded in every case where it appeared to a carrier in its interest to do so.

The reasons motivating the carriers to disregard or ignore these rules are usually grounded on consideration of traffic which can be diverted from other carriers to their lines by the payment of an allowance. The record discloses numerous cases in which unsuccessful

formal complaints were brought before us by industries seek-
71 ing an allowance. Notwithstanding our finding that such industries were not entitled to allowances, the carriers later granted them.

The principal reason for the large increase since 1920, in allowances in the Chicago industrial area is the close relationship existing between the Elgin, Joliet & Eastern, one of the carriers serving many industries in that area, and a large industry which receives allowances at many of its plants in the East. Because of the dominating influence of the parent industry, this carrier was not averse to making allowances, and in so doing disregarded the rules which had been drawn for the guidance of all carriers in making allowances. Competing carriers were thus forced to the same ends to secure or retain traffic. The practices give undue and unreasonable preference and advantage to the favored industry, and work undue and unreasonable prejudice and disadvantage to shippers in the same business who are not the beneficiaries of such allowances.

It is contended that in all cases where an industry performs its own spotting and receives an allowance therefor it can perform the work cheaper than the carrier, and that it is, therefore, in the interest of economy for the carrier to pay an allowance rather than perform the service itself. Doubtless this is true if it can be assumed that it is the carrier's duty to perform the spotting service in exactly the same manner as the industry finds it necessary to perform it in facilitating its operations. In making the cost studies the time consumed in moving cars between the interchange tracks and
72 the points of loading or unloading within the plant is taken into account in determining the cost to the industry, regardless of the number of times the plant engine moves to and from the interchange tracks. Thus the industry by performing its own service is enabled to have cars spotted at its convenience and to the extent that it is compensated therefor by the carriers it not only obtains a service far in excess of any service the carriers would give under the line-haul rates should they undertake to perform the spotting service, but also a service in excess of that afforded other shippers dependent upon the carriers for such service. Compare, *Chesapeake & O. Ry Co.* v. *Westinghouse, Church, Kerr & Co., Inc.*, *Chicago & A. R. Co. v. Kirby*, and *Davis v. Cornwell*, *supra*. The industries generally use small locomotives, have fewer men in the switching crew, and pay lower wages than the railroad. Thus if railroad engine-hour costs are computed on the basis of the number of engine hours charged by the industry to interchange switching, it is clear that the cost to the railroad would be greater. However, if the spotting service which the industry performs is not one which the duty of the carrier requires it to perform, the cost thereof whether great or small is of no concern and no economy to the latter.

Notwithstanding the fact that some industries are shown on the record to have intricate and complex systems of trackage consisting of numerous divisions and yards, each having a large number of

tracks aggregating many miles in length, it is contended that
73 even at the larger plants which now receive allowances, or which have locomotives assigned by respondents for exclusive use of such industries in performing the spotting service, no more than the equivalent of team track or simple switch placement was furnished by the carriers. It was attempted to establish that by dividing such industries into sections, and further subdividing these sections into small yards and individual tracks, a point is finally reached where the carrier would perform no more service in reaching such location than it would perform in reaching team tracks or individual industrial tracks scattered throughout a city. We cannot grant the merit of such assumptions, for as we have seen the service afforded at such plants is in excess of the service which the carriers are obligated to perform under the line-haul rates and in excess of the equivalent of team track or simple switch placement. Compare *New York Central & H. R. R. R. Co. v. General Electric Co.*, *supra*.

The argument has also been advanced on brief that a general definition of what constitutes the equivalent of team track or simple switch placement by the carriers involved herein can not be made. We are inclined to the belief that this argument has merit, but this assumption does not conflict with our view, which is that a determination of what constitutes a carrier's duty with respect to the equivalent of team track or simple switch placement can readily be ascertained at any individual industry by experienced railroad operating men or committees if honestly performed without consideration of traffic reasons.

71 A vice president of one of the larger railroad systems gave general testimony with respect to his study and efforts to obtain uniformity in the matter of allowances. His testimony taken as a whole, recognizes the general confusion and lack of uniformity that have existed among the carriers for many years, due largely to the fact that each carrier has pursued whatever course its self-interest dictated with respect to the advisability of granting an allowance.

He also referred to the competitive methods of transportation which have greatly increased since 1920, and recognized that due to such competitive methods the railroads of the country at present should firmly retain the advantage now accruing to them in the performance of spotting service, maintaining that the delivery and receipt of freight upon private industrial sidings is one of the most important advantages that railroads have in retaining their close association with the shippers, with consequent traffic benefit to the railroads. He considers it entirely proper for a carrier to employ an industry as its agent to perform spotting service where the industry operates its own power, so long as the allowance for such spotting is less than the cost to the carrier, and where the carrier could itself perform such service. Clearly this latter statement means that where a carrier could not, for any reason perform the service,

an allowance would be improper. Further, as we have previously shown, the allowances which the carriers pay are usually based upon actual cost subject to a certain maximum amount. This cost
75 is determined in part by the number of engine hours devoted to the spotting service regardless of the number of movements to and from interchange tracks made by the plant power.

INDUSTRIAL WEIGHING

Practically all industries engaged in the production of iron and steel products, cement, sand and gravel, and similar heavy commodities, maintain track scales within their plants and weigh all cars handled, both empty and loaded. The industries are thus enabled to keep an accurate record of the many materials and the grades thereof used in their operations. Weighing service, therefore, as carried on by industries is an indispensable part of the production and merchandising of their products.

Ordinarily the weights obtained by the industries are accepted by carriers for assessing freight charges, and the carriers are thus relieved of weighing on their scales. It is urged on this record that inasmuch as the carriers are relieved of the expense of weighing, the weighing service as conducted is equally beneficial to both the industries and the carriers. The record is entirely persuasive, however, that the industries maintain their scales and weigh their raw materials and finished products as well as the empty car entirely for their own benefit and convenience, and that the benefit derived by the carrier through the use of such weights is merely incidental.

In practically all cases the unwillingness of the industries
76 to accept the weights of the carriers and the consequent use of the industries' scales involves extra switching within the plants, and this accounts for the fact that in many cases the industries will not permit carriers to deliver or receive cars directly at the point of unloading or loading, but require such delivery or receipt on tracks from which the cars can later be moved to the scales, weights ascertained, and the cars thereafter placed at the location desired by the industries. The manufacture of some products, for example, cement, requires ascertainment of the weight of all raw materials in order that these may be delivered at the point where manufacture begins, in the exact proportions necessary in delivering a product of the desired specifications. The movement of cars from the point where they are originally delivered or received to the scales for weighing and their later placement would necessitate a charge for such movement if performed by a carrier. An industry by the use of its own locomotives thus avoids such expense, at the same time performs a service indispensable to its operations, and in many instances receives payment by the carrier for such service. There is no indication on this record that the individual respondents are unable or unwilling to render such weighing service upon their own scales as it is incumbent upon them to perform.

Illustrative of the necessity for plant weighing, the record shows one case where the switching service within the plant is performed by a locomotive jointly operated by several respondents. In this case cars are placed in an interchange yard within the plant
77 by respondents. Such cars are later moved by the industry's locomotive to the scales, weighed, and placed in a second industrial yard also within the plant, and from this latter point are thereafter moved by the respondents' joint locomotive to the numerous points of unloading within the plant without charge in addition to the line-haul rate. In this case the respondents have their own track scales, and are able and willing to perform the same weighing service for this industry that they perform for all other shippers. The industry is unwilling to accept the weighing service which it is respondents' duty to perform. Its operations require the use of its own scales with the consequent necessity of respondents' making a second movement of the cars without any compensation therefor. Under Rules 8, 9, and 10 of appendix A, the scale is regarded as the point of interruption or interference and the service performed after such interruption or interference is chargeable to the plant.

DEMURRAGE RULES

The Uniform Code of Demurrage Rules was promulgated early in 1910 as a result of recommendation of the Committee on Car Service and Demurrage of the National Association of Railway Commissioners, of which a former member of this Commission was chairman. Rule 3–E of the present code which was formerly 3–F provides:

"Section E. Except as otherwise provided in Section B, Paragraph 1, of this rule on cars to be delivered on interchange
78 tracks of industrial plants performing the switching service for themselves or other parties, time will be computed from the first 7:00 a. m. after actual or constructive placement on such interchange tracks until return to the same or another interchange track. Time computed from actual placement on cars placed at exactly 7:00 a. m. will begin at the same 7:00 a. m.; actual placement to be determined by the precise time the engine cuts loose. (See Rule 2, Section A, Paragraph 2, page 31, Rule 4, Section C, page 35, and Rules 5 and 6, pages 36 and 37.) Cars returned loaded will not be recorded released until necessary billing instructions are furnished.

"NOTE.—Where two or more parties each with its own power take delivery from the same interchange track, or where the railroad company uses the interchange track for other cars, or where the interchange track is not adjacent to the plant and the industry uses the railroad's tracks to reach same, a notice of placement shall be sent or given to the consignee and time will be computed from the first 7:00 a. m. thereafter."

It does not differ materially from what was formerly Rule 3–F. Rule 5 of the code, the so-called "constructive placement rule", provides:

"When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track can not be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee,
79 such car will be held at destination, or, if it can not reasonably be accommodated there, at the nearest available hold point, and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement."

It is significant that at the time these rules were adopted certain of the large industries which performed their own switching service proposed to have incorporated therein what is known as the industrial rule. This rule in substance provided that when cars were interchanged with minor railroads or industrial plants performing their own switching service, handling cars for themselves or other parties, an allowance of 24 hours would be made for switching in addition to the regular time allowed for loading and unloading. If returned loaded an additional 48 hours free time would be allowed. The rule was tentatively approved by the sub-committee, and differed from what has just been stated in the fact that minor railroads were not included. After more mature deliberations, however, the committee reached the conclusion that it should have no place in the demurrage code, and in effect held that the carrier can make no allowance of any character to a shipper or receiver for doing what the carrier itself is under no obligation to do, and that an allowance in the form of additional time was just as unlawful as one in the form of money.

Section 1 (3) of the act includes "delivery" and "receipt"
80 in connection with "transportation". Their ordinary signification must be applied to such words. Therefore, delivery, i. e., the act of delivering, release, transference, or surrender, as applied to cars, must be taken as the act of the carrier in surrendering its control of the cars to the industry.

Generally all industries which perform their own spotting service have entered into average demurrage agreements with the carriers that directly serve them and this should be borne in mind when we come to consider overhead allowances.

OVERHEAD ALLOWANCES

Many of the plants discussed in this report are reached directly by one or more carriers and are indirectly reached by other carriers through absorption of switching charges. Allowances are made to these plants on line-haul traffic by the carriers that reach them directly. These carriers make no allowances, generally speaking, on traffic on which they secure merely a switching charge. In these instances the carrier that absorbs the switching charge makes an allowance to the plant, and these allowances are hereinafter designated as overhead allowances. However, all cars whether trans-

ported by the carrier in line haul or switching service are taken into account in the demurrage records of the delivering carrier. The tariffs providing for the switching charges in some cases list the industries to which the switching charges apply, in others, the switching limits are defined, and in still others switching charges are specifically designated to apply from the interchange track of
81 the connecting line to interchange tracks of the plant. Thus, in the first two cases mentioned if it can be said that the switching charge applies from the interchange track of the connecting line to a final spot within the plant, the line-haul carrier by the absorption of the switching charge has paid the delivering carrier for that service, and the action of the line-haul carrier in making an overhead allowance to the plant results in a double payment by it for a portion of said service. If on the other hand, the switching charge applies to the interchange track of the plant, and the plant requested the switching carrier to perform the actual spotting within the plant beyond the interchange track, an additional charge would necessarily apply for that additional service. The plant by performing the service with its own power relieves itself of paying that charge, and receives an allowance therefor. There can be no justification for an allowance in this latter instance and the payment thereof is a pure rebate. The carriers assign as a reason for their failure to make an allowance out of the switching rate, instead of having the line-haul carrier make an overhead allowance, the fact that the revenue derived from the switching charge is too thin; further that the industry is performing a service which the carriers paying the allowance are required to perform as part of their transportation duty. Just how the carriers could perform this service is not apparent. It is claimed the switching line is agent for the line-haul carriers, and the industry is the sub-agent. If this were true a separate average demurrage agreement should have been en-
82 tered into with each line-haul carrier and not with the switching line. However, the position taken is inconsistent, because they state that the allowances are made to the plant to fulfill what they regard as their obligation in spotting the cars at the point of loading or unloading, and that the allowances paid are in all cases less than the cost would be to the carrier if it undertook to perform such service. Manifestly, this would likewise be true with respect to the switching service if as a matter of fact the switching charge can be said to extend to the point of loading or unloading within the plant. Nevertheless, these carriers say that rather than pay an allowance on such traffic they would elect to perform the service themselves. Nothing seems clearer than that the obligation to make delivery rests only with the delivering line, whether that line be a trunk line or switching carrier. If any allowance is to be made to industries for performing a part of the service which the delivering carrier is under legal obligation to perform such allowance should concern only the delivering carrier.

SUMMARY

Involved in this proceeding are approximately 200 industrial plants where spotting allowances are paid; and also numerous plants at which respondents assign locomotives to perform spotting service beyond the points of interchange. In either case a second placement of cars is made. Some of the latter plants require the full-time assignment of locomotives for their exclusive use, and the
83 service is performed under the direction and control of the industry. Others require such service for shorter periods, in some cases amounting to several hours daily. Manifestly it is not the amount but the kind of service required which must be considered in determining whether the performance of such service is an obligation of the carrier under its line-haul rates.

This proceeding also involves many industries which perform their own service without the assumption by respondents of the costs of any operation beyond the points of interchange. Some of these have unsuccessfully sought allowances, or requested respondents to perform greater service, which has been refused. Others have made no application for allowance, or for greater service, due to the fact that the service of a locomotive not under its direction and control would be attended by extreme hazards to plant employees or property, and in some instances by the necessity for secrecy regarding manufacturing methods. Others do not desire the operation of respondents' locomotives within their plants because of interference with industrial operations, even though to perform the service themselves results in increased operating expenses. We believe it must be conceded that industries such as are described in this paragraph are often compelled through the payment of freight rates to bear transportation charges which are dissipated by certain respondents in payment for or performance of services which are in excess of such respondents' legal obligations. Payment of allowances by respondents amounted to more than $9,000,000 for the years
84 1927 to 1931, inclusive, but we have no means of estimating the expense to respondents for performing spotting service at industrial plants.

While it is contended that discontinuance of payment of allowances, or performance by the carriers of service in lieu thereof, would induce the industries affected to use competitive means of transportation, such contention is unsupported by convincing evidence. It does not appear that the respondents which do not pay for or perform industrial spotting service have suffered to any greater extent from competitive forms of transportation than those carriers which have indulged in such practices. We reach the conclusion that little if any traffic is being retained by respondents through the payment of such allowances, or the performance of spotting service.

It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a

different conclusion. Many of the industries which now receive allowances or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne.

This report deals only with traffic handled in interstate commerce and with Class I carriers. The principles announced, however, should be followed by all carriers subject to the Interstate Commerce Act. Sections 15 (13) of the act has been subjected to abuse. Many allowances of the kind herein considered were and are paid which were and are unwarranted.

When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9, and 10 of Appendix A, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the act.

Generally, the payment of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest.

MAHAFFIE, Commissioner, dissenting in part:

Much of the majority report is devoted to a discussion of legal principles with which I agree. It seems to me entirely clear that an allowance to an industry for spotting, which can not be done by the carrier on account of physical conditions, or which the industry is unwilling to allow the carrier to perform, is improper. Not only does this seem clear, but it is, I think, undisputed on this record.

I do not agree, however, that the right of the carrier to perform terminal services is limited to what is termed "the equivalent of team-work spotting", nor that a tariff which provides for a terminal service in excess of what apparently is considered to be that minimum, is necessarily unlawful.

I think it likely that practices have developed in connection with both services and allowances that are wasteful and should be discontinued. Notwithstanding that fact, however, a carrier has a certain discretion as to the terminal services it will perform in connection with the line-haul movement.

"The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it. (Interstate Commerce Commission v. Stickney, 215 U. S. 98, 105.)"

Some carriers hold themselves out to perform store-door
87 pick-up and delivery services on certain classes of traffic at no additional cost to the shipper. Tariffs providing for lighterage and elevation services, or allowances for such service performed by the shipper for the carrier, are not considered improper. United States v. Baltimore & O. R. Co. (Arbuckle Case), 231 U. S. 274; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42; Lighterage Cases, 203 I. C. C. 481.

In determining whether a practice is wasteful we should be in position to find that it has an adverse effect on the carrier's net income. No such finding can, I think, be made as to the practices here held unlawful. Nor do I understand the majority so to find.

While it is concluded that allowances are wasteful and contrary to the public interest, the jurisdictional findings necessary to support that conclusion are not made. Nor does the majority find that the services for which allowances are made have not been considered in fixing the level of the line-haul rates. Chesapeake & Ohio Ry. Co. v. Westinghouse, Church, Kerr & Co., Inc., 270 U. S. 260–265. The record, on the contrary, is conclusive that they have been considered in many instances. It is equally conclusive that it is generally an economy to the carrier to make the allowance rather than to perform the service with its own forces. The act makes it the duty of the carrier to handle shipments offered from and to locations on private sidings. This necessarily involves placement of the car for loading and unloading. An industry track placement is as much the carrier's duty as placement on a team-track. Whether it is as
88 "simple" is beside the point. The fact is that by reason of the volume of traffic and the lack of capital investment in the facility and expense in maintaining it, it usually is less expensive to the carrier to perform its terminal services on industry track than on its own team-tracks.

The general subject here under consideration is not new. It has been before the Commission and the courts many times. General Electric Co. v. New York Central & H. R. Co., 14 I. C. C. 237; Associated Shippers of Los Angeles v. Atchison, T. & S. F. Ry. Co., 18 I. C. C. 313; Car Spotting Charges, 34 I. C. C. 609; Interstate Commerce Commission v. Stickney, supra; Interstate Commerce Commis-

sion v. Diffenbaugh, supra; Atchison, T. & S. F. Ry. Co. v. United States, 232 U. S. 199; Los Angeles Switching Case, 234 U. S. 294; New York Central & H. R. Co. v. General Electric Co., 219 N. Y. 227.

In my judgment, there is no warrant in this record or in the cases relating to the subject for finding, as does the majority, that services rendered beyond "the equivalent of team-track spotting" are unlawful.

Commissioner Aitchison did not participate in the disposition of this proceeding.

By the Commission.

[SEAL] GEORGE B. MCGINTY,
Secretary.

89 APPENDIX A

Action of the Traffic Executive Association—Eastern Territory, at Meeting Held July 18, 1929

In view of the conditions under which arrangements for plant facility allowances have developed, it was the concensus (a) that such allowances should be limited to iron and steel industries and (b) should be on the 1915–1916 cost basis.

In the event that any departure from the foregoing is deemed advisable, the proposal with all the facts should be presented to the Traffic Executive Committee having jurisdiction, for review prior to any investigation of costs of approval or recommendation of the proposed arrangement.

Procedure for consideration of applications for allowances and rules for determination of allowances to industries for plant facility operation, adopted by the Central Freight Association, Trunk Line Association, and New England Freight Association.

(1) There shall be appointed a Special Standing Committee of not to exceed seven (7) members to be known as the C. F. A. Committee on Terminal Allowances and to be composed of members of
90 the General Committee who shall act in person and not by proxy, except to another member of the Committee, to whom shall be referred for investigation and recommendation, all applications for new allowances or for changes in allowances already made, it being understood that in Trunk Line Territory, a Special Committee is not necessary inasmuch as the matters referred to are handled by the Freight Traffic Managers Committee. It was understood that in Trunk Line Territory the Freight Traffic Managers Committee will act in the same manner as the special committee of the C. F. A.

(2) There shall be appointed an Accounting Committee to conduct cost studies of plant facility operations in the manner provided below. This Committee shall, in all cases, include local operating

representatives of the roads serving the plant who, in co-operation with the Study Committee, shall determine whether the plant is properly, efficiently and economically operated.

(3) These committees shall function as follows:

1. A plant ~~desiring~~ a plant facility allowance or a change in an existing allowance should present its application on prescribed form to the Railroad or Railroads with which it connects, such application to be supported by five (5) copies of blue print or other diagram showing the complete layout of the plant and tracks.

2. If the Railroad or Railroads which receive the applica-
91 tion desire to avail themselves of the services of the applicant and make an allowance therefor, it or they shall submit the application to the Chairman of the Association having jurisdiction with request that study be made. The Chairman of the Central Freight Association will then confer with the Chairman of the Committee on Terminal Allowances as to allowances in C. F. A. territory.

(a) If in their opinion the study should not be made a conference of the directly interested roads with the Committee on Terminal Allowances shall be held to consider the subject.

(b) If in their opinion or in the case of allowances in Trunk Line or New England Territory in the opinion of the General Committees a study should be made—

The Chairman of the Association in whose territory the study is to be made shall instruct the Accounting Committee, referred to in Section 2 hereof, to review the operation of the plant and decide if it conforms with good railroad practice or otherwise. If the operation is found to be improper or not according to good railroad practice, the Accounting Committee will confer with the applicant and suggest changes necessary to meet those requirements. If
92 such requirements are not fulfilled no study shall then be made, but the Accounting Committee shall report its findings to the C. F. A. Committee on Terminal Allowances for review and recommendation to the General Committee in the case of C. F. A. and to the T. L. or N. E. Gen. Committees in the case of allowances in those territories. If in the opinion of the Accounting Committee the operation is proper it will proceed to make a study to determine the cost in the manner set forth in Rules 1 to 16, inclusive.

(c) The Interstate Commerce Commission has held that switching services by a plant facility for account of a carrier must not exceed the equivalent of team track or simple switch placement. If no unusual or marked difficulty of operation in a plant is presented, the service may be considered not in excess of a simple switch.

If the plant requires some unusual complicated or expensive switching service in comparison with other plants of substantially the same type (but not necessarily of the same output) in the same vicinity, it shall be held that the service is in excess of a simple switch and no allowance shall be made.

93 (4) Upon receipt of the Accounting Committee's report, the Chairman of the Central Freight Association shall submit it to the Committee on Terminal Allowances for its review and recommendation. Upon receipt of the report and recommendation of the Committee on Terminal Allowances, the Chairman of the Central Freight Association shall present it to the General Committee for consideration. If approved it shall be referred to the Central Traffic Executive Committee for disposition. For Trunk Line and New England Territory, the report of the Accounting Committee will be submitted by the Chairman of the Trunk Line Freight Traffic Manager's Committee or the Chairman of the New England General Committee as the case may be, to said Committees, respectively, for disposition.

RULES FOR DETERMINATION OF ALLOWANCES TO PLANT FACILITIES

Rule 1. To determine the amount to be paid by the Railroad to the plant for terminal service performed, a study of the switching operations of the Plant shall be made and cost of all services thus obtained. The study shall be made jointly by authorized representatives of the Railroad and of the Plant for an agreed period of time, to be known as the "test period", during which period the operations must be typical or as nearly as possible of average normal operating and weather conditions.

94 Rule 2. The test period shall be sufficient to reflect representative average performance and expense. A minimum of seven (7) consecutive days should be taken with a preliminary educational period in which to instruct employees relative to the proper compilation of the field data. The data covering the preparatory period must not be used. If conditions are such that a test period of seven consecutive days is not representative of average or normal operating and weather conditions a period which shall be a multiple of seven days shall be studied.

Rule 3. An accurate record shall be made, on Work Report Card Form TAS–1, per sample attached hereto, of the service performed by each locomotive. The detail of service by minutes and the number of loaded and empty cars handled shall be recorded thereon. The cards shall be compiled by representatives of the Railroad and of the Plant at the time the service is performed, according to Rule 10 (Section 1 to 16, inclusive) hereof.

Rule 4. The proportion of the total time of locomotive service that is chargeable to the Railroad and the Plant shall be obtained from an analysis of the work report cards according to Rules 10 (Section 1 to Section 20), 11, 12, 13, 14, and 15. The percentage of the total time chargeable to the Railroad as reflected by the analysis shall be applied to the total cost of the locomotive service, as provided for in Rule 16 hereof, to obtain the proportion of the expense chargeable to the Railroad.

Rule 5. The proportion of the expense chargeable to the
95 Railroad as prescribed in Rule 4 shall be divided by the total number of inbound and outbound loaded cars interchanged with the Railroad, during the test period to determine the amount per loaded car that may be allowed to the plant by the Railroad for terminal service performed. The number of loaded cars should be restricted to those physically interchanged by the locomotives during the test period.

Rule 6. The allowance to a plant for a terminal service shall be the same amount for each connecting Railroad and shall not exceed the amount it would cost the Railroad to perform the same service with its own locomotives, at its convenience, without interruption or interference. The cost of Railroad operation to be in each case determined from available data by the Study Committee.

Rule 7. The Plant shall receive from the Railroad on designated interchange tracks loaded or empty cars for placement at the Plant and shall deliver loaded or empty cars from the Plant on designated interchange tracks.

Rule 8. The service between point of interchange and point of loading or unloading, as the case may be, shall be charged to the Railroad, provided it is a progressive movement to point of placement or delivery, performed without plant interruption or interference. If Plant interruption or interference is encountered the service after such interruption or interference shall be charged to the Plant

Rule 9. The following is a partial list of what shall be considered as plant interruption or interference as referred to in Rule 8.

96 (a) Convenience of the Plant, such as service in excess of normal operation.

(b) Plant operations that interrupt or interfere with movements of switch locomotives.

(c) Holding of cars for advice from the Plant as to disposition.

(d) Weighing for account of Plant.

(e) Locomotive crane operation that interrupts or interferes with movements of switch locomotives.

(f) Operation of Plant locomotives while engaged in performing work solely for account of the Plant that interrupt or interfere with movements of switch locomotives. This will include such services as switching car repair shop tracks of the Plant, moving cars of material between locations within the Plant, disposal of material for the Plant, etc.

(g) Maintenance or construction work, where it interferes with economical switching operations.

(h) Crews waiting for instructions from the Plant.

Section 18 of Rule 10 reads in part as follows;

"On cars weighed for information or account of the plant the scale is the point of interruption or interference."

97 *Exhibit B to bill of complaint*

Interstate Commerce Commission

American Sheet & Tin Plate Company Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II, Terminal Services

Submitted October 17, 1934. Decided July 5, 1935

Carriers' obligations under their interstate line-haul rates found not to extend beyond the present points of interchange, and payment of an allowance to the industry for services beyond such points found unlawful.

Same appearances as in the original report.

EIGHTEENTH SUPPLEMENTAL REPORT OF THE COMMISSION

Division 6, Commissioners McManamy, Lee, and Miller.

By Division 6:

In the original report in this proceeding, Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, certain principles were announced concerning the payment of allowances to industries for performing spotting service at their industrial plants, or the performance of such service by respondents in lieu of payment.

98 This supplemental report pertains to an allowance paid by The Pennsylvania Railroad Company and The Baltimore and Ohio Railroad Company to the American Sheet & Tin Plate Company for spotting service performed by the latter at its plants located at Vandergrift and Scottdale, Pa., and Wellsville, Ohio. The industry selected the terminal services at the Vandergrift plant as typical of those performed at its other plants, and our findings with respect to this plant will be equally applicable to the Scottdale and Wellsville plants.

The Vandergrift plant is on the Conemaugh Division of the Pennsylvania, 40 miles east of Pittsburgh, Pa., and is served exclusively by that carrier. The Scottdale plant is served by the Pennsylvania and Baltimore & Ohio. The Wellsville plant is served by the Pennsylvania, but was not in operation at the time of the hearing. The Vandergrift plant began operations more than 30 years ago, manufacturing steel by the open-hearth process, and converting it

into various grades and finishes of sheet steel by rolling. The plant tracks consist of two main tracks and 20 or 25 additional tracks, aggregating about 8 miles in length, serving 5 loading and 15 unloading points where freight cars are spotted.

Carload freight consigned to the tin plate company is composed chiefly of scrap, pig iron, ore, limestone, sulphur, annealing boxes, spelter, grease, lumber, and miscellaneous mill supplies, the greatest volume being of scrap and pig iron, which are unloaded by a magnetic crane. Outbound shipments are largely of sheet steel of
99 various kinds and sulphuric acid. Railroad tonnage in the year 1930, considered by the tin plate company to be a normal year, amounted to 5,783 inbound and 6,181 outbound carloads interchanged.

Inbound and outbound cars loaded and empty are delivered or received on interchange tracks located on railroad property near the west end of the plant property. The tin plate company owns the right-of-way and tracks connecting the interchange tracks with the industrial tracks. The tin plate company performs the service of moving the cars between the interchange tracks and points of loading or unloading within the plant at its convenience with its own switching locomotives, of which it owns four, three being in constant use over a 24-hour operating schedule, in performing the spotting service and intraplant switching. The maximum distance from the interchange tracks to the spotting locations within the plant is about 5,400 feet, the minimum about 800 feet, and the average 2,500 feet. For performing the spotting service the industry receives an allowance of $1.10 per loaded car. This figure is based on costs in 1916, and was established as of July 1917. There has been no change in the nature of the terminal services required at this plant since 1915, nor has the tin plate company ever requested the Pennsylvania to perform the spotting service.

In common with other iron and steel plants, the weighing service is a vital part of the industrial operations, and a large percentage of the inbound, and apparently all of the outbound traffic is
100 weighed. The scales are located at the west end of the plant near the interchange tracks. The movement of traffic from the interchange tracks is first to the scales and then to the points of loading and unloading within the plant. In other words, the spotting service could not be performed by the Pennsylvania in one uninterrupted movemet at its ordinary operating convenience. See Propriety of Operating Practices—Terminal Services, supra.

Witness for the tin plate company testified that it would be willing to have the Pennsylvania perform the spotting service, but that such service would have to be performed to meet the needs of the industrial operations, and that by proper cooperation, any interference between respondent's power and the intraplant operation of plant power could be avoided. Carriers are under no obligation to perform service beyond the agreed points of interchange solely for the

convenience of an industry. Merchant Shipbuilding Corp. v. Pennsylvania R. Co., 61 I. C. C. 214, 217; Car Spotting Charges, 34 I. C. C. 609, 617.

Witness for the Pennsylvania testified that the motive power used by the respondent in the district in which Vandergrift is located could not negotiate some of the curves within this plant, and that if called upon to perform the spotting service it would be necessary to assign smaller power to perform the service. He further testified that the cars are moved to and from the interchange tracks by the tin plate company's motive power and spotted as industrial operations demand, and as previously shown the plant would expect similar service from respondent.

101 He also testified with respect to the Scottdale plant that if the Pennsylvania undertook to perform the spotting service at that plant, it would be necessary to assign an engine of smaller type than now used in that general territory, for constant use.

The record shows that cars interchanged with this industry have been received and delivered by respondent upon tracks designed specifically for that purpose, or by long usage established as the proper and agreed interchange points.

We find that the interchange tracks at this plant are reasonably convenient points for the delivery and receipt of interstate shipments of carload freight; that the industry performs no service beyond such points of interchange for which the respondent carrier is compensated under its interstate line-haul rates; and that by the payment of an allowance the respondent carriers provide the means by which the industry enjoys a preferential service not accorded to shippers generally, and refund or remit a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of section 6 (7) of the act.

An appropriate order will be entered.

102 *Exhibit C to bill of complaint*

ORDER

At a Session of the Interstate Commerce Commission, Division 6, held at its office in Washington, D. C., on the 5th day of July, A. D. 1935.

American Sheet & Tin Plate Company Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The

Pennsylvania Railroad Company to the American Sheet & Tin Plate Company for performance by the latter of spotting service within its industrial plants at Vandergrift, Pa. and Wellsville, Ohio, and by The Pennsylvania Railroad Company and The Baltimore and Ohio Railroad Company for like service at the plant of the American Sheet & Tin Plate Company at Scottdale, Pa., and the Commission having under date of May 14, 1935, made and filed a report, Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed

a supplemental report containing its findings of fact and
103 conclusions with respect to the allowance paid to the American Sheet & Tin Plate Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance the above respondent carriers violate the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That the Pennsylvania Railroad Company and The Baltimore and Ohio Railroad Company be, and they are hereby, notified and required to cease and desist on or before August 22, 1935, and thereafter to abstain from such unlawful practice.

By the Commission, Division 6.

[SEAL] GEORGE B. McGINTY,
Secretary.

104 In United States District Court

[Title omitted.]

No. 3110 In Equity

Order setting cause

And now, this 25th day of July, 1935, it appearing that the within Bill of Complaint has been filed in this Court, and motion having been made by counsel for plaintiff for hearing upon its application for an interlocutory injunction, such application is set for hearing at 9 o'clock A. M., on the 31st day of July 1935, notice of such hearing to be given to the Attorney General of the United States and to the Interstate Commerce Commission and to the Pennsylvania Railroad Company.

F. P. SCHOONMAKER,
District Judge.

105 [File endorsement omitted.]

(1) In United States District Court for the Western District of Pennsylvania

No. 3111 in Equity

ALLEGHENY STEEL COMPANY

v.

UNITED STATES OF AMERICA
THE PENNSYLVANIA RAILROAD COMPANY

Petition

Filed July 25, 1935

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania:

Your petitioner, Allegheny Steel Company, a corporation, presents this its petition against United States of America and The Pennsylvania Railroad Company; and thereupon petitioner respectfully states:

I. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, with principal office at Pittsburgh in said Commonwealth and in the Western District of Pennsylvania, and owning and operating a plant at Brackenridge, Pennsylvania, where it is now and for many years
(2) past has been engaged in the manufacture of steel and steel alloy products; and in the conduct of said business it receives at its plant large quantities of ore, coal, limestone, and other raw commodities and other materials, and ships large quantities of manufactured steel and alloy products from said plant.

II. Respondent The Pennsylvania Railroad Company is a common carrier of property by railroad between Brackenridge, Pennsylvania, and points in other states, and as such common carrier is subject to the Interstate Commerce Act, and owns and operates lines of railroad within Pennsylvania and in other states, and transports interstate freight for delivery to petitioner's plant at Brackenridge, Pennsylvania, and in like manner transports freight from said plant to destinations in other states.

III. Petitioner brings this suit in equity against the United States of America pursuant to an Act of Congress approved October 22, 1913, 38 statutes at large 219 (28 U. S. C. A. Sec. 41, subsections 45, 46, 47), and under the general equity jurisdiction of this Court, to enjoin, set aside and annul a certain report and order entered by the Interstate Commerce Commission on June 7, 1935, in a proceeding known as Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II., Terminal Services, said report and order being subtitled Eleventh Supplemental Report of the Commission, Allegheny Steel Company Terminal Allowance, and

(3) to enjoin and restrain the respondent carrier from complying with the aforesaid order of the Commission entered June 7, 1935.

IV. The said Commission, on its own motion, entered an order under date of July 6, 1931, without any complaint having been made to or petition filed with said Commission, according to petitioner's information and belief, which said order was in words and figures as follows:

"ORDER

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July A. D. 1931

"Ex Parte No. 104

"Practices of Carriers Affecting Operating Revenues or Expenses

"Sections 12 and 15 (a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act will affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

"It is ordered, That the commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and investigation into and concerning practices of carriers by railroad subject to the interstate commerce act which affect operating revenues or expenses;

(4)

"It is further ordered, That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

"And it is further ordered, That this proceeding be assigned for hearing at such times and places and with respect to such practices as the commission may hereafter direct.

"By the Commission.

[SEAL] "GEORGE B. McGINTY,
"*Secretary.*"

Petitioner presumes that aforesaid order was served upon all so-called class I carriers by railroad subject to the Act, and therefore avers that said order was served upon each of the carrier respondents.

Subsequently, the Commission issued its notice under date of August 13, 1931, entitled "Ex Parte No. 104, Part II, Terminal Services of Class I Carriers. Notice of Information to be sought at hearings." In said notice, the Commission ostensibly defined "in scope and restriction" said Part II of the aforesaid general inquiry as intended to establish facts concerning various services, charges

and practices of carriers subject to the Act, including, among others, terminal services and practices in the receipt and delivery of carload freight, including the spotting of cars, and all services and privileges, except transit and lighterage, incident to said terminal

(5) services within the meaning of Section 6 of the Interstate Commerce Act, which affect the measure of the transportation service performed at the line-haul rates and the value of such services to the consignors and consignees; the extent to which the line-haul rates include charges for such services; allowances and absorptions made out of the line-haul rates; and the extent to which such services reach beyond the carriers' terminals to particular locations on private tracks, sidings, industrial plant tracks, and on the rails of industrial common carriers.

The Commission conducted extended hearings in said proceeding at numerous places, at various times from September 15, 1931, to November 21, 1932; thereafter a "proposed report" was prepared by the Commission's Director of Service, W. P. Bartel, before whom the hearings had been held; exceptions were filed by numerous parties; and oral argument before the Commission was had. Thereafter the Commission issued its report, dated May 14, 1935, without order, which report has subsequently been described by the Commission as its original report in which it reviewed the subject matter of the inquiry generally and set forth its legal conclusions.

A copy of said original report of the Commission is attached hereto, marked Appendix A, and is made a part hereof as fully as though set forth at length herein.

On July 19, 1935, petitioner filed with the Commission its petition for vacation of said order of June 7, 1935, upon various errors of fact and law alleged therein. Petitioner is not advised that the Commission has yet acted upon said petition.

(6) V. The uniform custom and practice of all common carriers, in the State of Pennsylvania and in other states throughout the Union, including the carrier named as respondent in this bill, is to state in their rate tariffs published and filed with the Commission the city, town, or other station locality to and from which they undertake to transport freight at the rates and charges in such tariffs stated, without stating the precise spot in such city, town, or station locality at which they undertake to receive or deliver such freight. Under such tariffs it is and for many years has been the uniform custom and practice to include within the carload freight rates established and maintained for the transportation of carload freight the complete service comprehended in (a) the providing and furnishing of a suitable car for transportation and the placement of the car at any point reasonably accessible and convenient for loading on standard gauge tracks serving any and all industrial plants; and after the freight has been loaded in said cars by consignor, to remove the same and transport the goods therein to destination; and (b) to deliver the carload freight by placing the car, wherein such freight is transported, at any point reasonably convenient for the

unloading and removal of the freight from the car on the standard gauge tracks serving any and all industrial plants and to remove the empty car therefrom after the freight has been received and unloaded by the consignee. It is customary for railroads for various reasons sometimes to employ other railroad companies to complete their undertaking to spot the cars as aforesaid, and to pay
(7) such other railroads for such service, and sometimes to employ the shipper or receiver of freight to complete said undertaking to spot the cars as aforesaid and in such cases to compensate by payments termed allowances to such shippers and receivers of freight for such service. Respondent carrier has followed such customs generally in serving shippers and receivers of freight over its lines of road.

Pursuant to such custom, respondent the Pennsylvania Railroad Company has always provided in its tariffs that, for the compensation afforded by its established rates for transportation between designated cities, towns, or other station localities, it would deliver and receive carload freight by the placement of the cars at any reasonable and convenient point for the loading or unloading thereof on the tracks serving the said plant of petitioner at Brackenridge, Pennsylvania, the same as at all plants, industries, and business establishments adjacent to its railroad and served by so-called private or industrial sidings.

The duly filed and published tariffs of respondent The Pennsylvania Railroad Company and all other carriers in the Commonwealth of Pennsylvania and in other states of the United States, as in effect now and for more than twenty years past, name rates for transportation covering the complete services described in this paragraph, with respect to carload freight moving to and from any and all railroad terminals and industries, plants, warehouses, or other business establishments; and the same rates have been applicable and have
(8) been applied by all of said carriers, whether carload shipments of freight originated on so-called public team tracks or on so-called private side tracks serving the plants, industries, and other business establishments and whether such shipments were delivered on so-called public team tracks or on so-called private side tracks as aforesaid.

VI. The record in the aforesaid investigation by the Commission in Ex Parte 104, Part II, contains abundant testimony by numerous witnesses supporting the averments in paragraph V hereof; and there is no evidence in said record to the contrary.

There is no evidence in said record that the carriers in serving any industry, plant, warehouse, or other business establishment have sought to limit their duty or terminate their obligation under the line-haul rates by placement of cars at any point short of or intermediate to the place mutually agreed upon with the shipper or consignee as reasonable and convenient for the loading or unloading of carload freight.

VII. Section 1 of the Interstate Commerce Act, U. S. Code, title 49, Sec. 1, 41 Stat. L. 474, provides:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, * * *.

"(2) The provisions of this Act shall also apply to such transportation of passengers and property * * * but only in so far
(9) as such transportation * * * takes place within the United States, * * *.

"(3) The term 'common carrier' as used in this Act shall include * * * all persons, natural or artificial, engaged in such transportation * * * as aforesaid as common carriers for hire. * * * The term 'railroad' as used in this Act shall include all * * * the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *

"(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of * * * property to provide and furnish such transportation upon reasonable request therefor, * * *"

(10) Section 6 provides:

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property * * * will be carried, * * * and shall also state separately all terminal charges, * * * and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the * * * shipper, or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. * * *

"(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of * * * property, as defined in this Act, unless the rates, * * * and charges upon which the same are transported by said carrier have been filed
(11) and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates, * * * and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, * * * and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15, paragraph 13, provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

(12) VIII. Petitioner Allegheny Steel Company for many years past has rendered the transportation service and furnished the instrumentalities employed in moving carloads of freight between the rails of respondent The Pennsylvania Railroad Company adjacent to petitioner's plant, and convenient points of loading or unloading in said plant; an application for compensation in the form of allowance for such service was submitted by petitioner to said respondent shortly before the period of federal control of railroads; said application was considered by the Director General of Railroads upon his assumption of the operation of all railroads including respondent under the federal control act; and on behalf of the United States Railroad Administration it was suggested that the Steel Company submit the question to the Interstate Commerce Commission. Thereupon petitioner filed with the Interstate Commerce Commission its complaint praying for relief in the premises, hearing was had, and the Commission rendered its decision on or about March 11, 1921, Allegheny Steel Company v. Director General et al., 60 I. C. C. 575, wherein the Commission found at page 578:

"The facts of record are not deemed such as to support a finding of unreasonableness, but we find that in respect of interstate carload traffic moving between the trunk line and loading and unloading points within the limits of complainant's plant, the failure of the

defendants to perform the switching and spotting service with their own motive power or to make an allowance to complainant
(13) covering the cost of that service performed by it does and will for the future subject complainant to unjust discrimination as between it and similarly situated competitors in the Pittsburgh rate district for whom such services are performed by the defendants without additional charge or to whom allowances are made for the performance thereof."

Pursuant to said finding the Pennsylvania Railroad Company, electing at that time to perform the service rather than pay the allowance, made its offer so to do, which offer petitioner Allegheny Steel Company then declined. Later, and after changes in the plant track layout in connection with certain rebuilding of the plant structures, petitioner renewed its demand for performance of this spotting service by respondent or else payment of allowance by respondent to petitioner for the latter's performance thereof. Respondent conducted an investigation of the cost of performing the spotting service as a basis for allowance, and thereafter duly established such allowance, effective July 15, 1930.

IX. At all times since July 15, 1930, the duly filed and published tariff of respondent the Pennsylvania Railroad Company has been in force, providing payment of allowance by respondent to petitioner for the latter's transportation service of moving and placing cars at loading and unloading points in its plant, and said tariff currently effective provides as follows:

(14) "The Pennsylvania Railroad Company

"Local Freight Tariff

"Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company

"On all carload revenue shipments, also on cars containing 12,000 pounds or more of less carload revenue freight, destined to or coming from the plant of the Allegheny Steel Company, the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

"For such terminal service performed for the Pennsylvania Railroad Company by the Allegheny Steel Company, the latter will be allowed One Dollar and Seven Cents ($1.07) per loaded car, which will include the handling of the empty cars in the reverse direction.

(15) "This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the

plant facility made during period February 26 to March 7, 1930, inclusive, and filed with the Interstate Commerce Commission.

"When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car, the allowance for each additional car in the series or lot will be Fifty-four (54) cents or fifty (50) percent of the allowance for the first car.

"On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.—O. C. 50, P. S. C. Pa. O. C. 50 (D. T. Lawrence, Agent), supplements thereto or successive issues thereof, the allowance will be Fifty-four (54) cents or fifty (50) percent of the allowance for the first car.

"The foregoing arrangement does not include traffic handled under switching charges as named in G. O. I. C. C. 14296, G. O. P. S. C. Pa. 4798 (Agent's Index 54), supplements thereto or successive issues thereof; nor on shipments of slag, ashes, or other refuse material for wasting, as named in Agent B. T. Jones' I. C. C. 1695, P. S. C. Pa. 97, supplements thereto or successive issues thereof."

The foregoing tariff also contains provisions excluding coal, coke, and ore, but a similar tariff provides for like allowance on coal and coke.

(16) X. Respondent has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a tariff to become effective August 1, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner, as follows:

"Cancellation Notice

"The Pennsylvania Railroad Company

"Local Freight Tariff

"Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company is hereby canceled

"Allowance Discontinued

"Issued in compliance with Eleventh Supplemental Report and Order of the Interstate Commerce Commission in Ex Parte No. 104, Part 2, decided July 7, 1935.

"Similar tariff has been filed with the Interstate Commerce Commission and Public Service Commission of Pennsylvania cancelling the tariff which provides for allowance on coal and coke, effective the same date.

"Respondent has given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of

(17) June 7, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent

would not have filed the aforesaid tariff cancelling said allowance were it not for the fear of incurring penalties for failure to comply with said order."

XI. The aforesaid order of the Commission instituting its investigation Ex Parte 104 on its own motion and without formal pleading, as set forth in paragraph 4 of this petition, was not based upon any complaint or application of any sort submitted to the Commission by any person, either carrier or shipper, that the practice above described as in force at petitioner's plant was unreasonable, discriminatory, or in any way in violation of law, so far as known to petitioner. In the branch of said proceeding designated Part II, Terminal Services of Class I Carriers, in which the testimony relative to petitioner's plant was taken, no party, either carrier or shipper, presented any testimony purporting to show that said practice at petitioner's plant was unreasonable or discriminatory or otherwise in violation of law in any respect. Petitioner's representative appeared at said hearing in response to a request addressed to petitioner by the Secretary of the Commission, and said representative in response to the call of the presiding Director of Service of the Commission became a witness and presented testimony describing said practice. No other testimony as to said practice at petitioner's plant was presented except on behalf of respondent

(18) The Pennsylvania Railroad Company which respondent was a party to said proceeding of investigation solely by virtue of the Commission's order instituting such investigation and making all so-called Class I railroads of the United States respondents therein, and said respondent The Pennsylvania Railroad Company presented its testimony in support of the existing practice and tariffs.

XII. The said report and order of June 7, 1935, as above set forth, is unlawful and void in the following respects:

1. The Commission was without authority to make the said order.

2. The Commission failed to make requisite findings sufficient to support its order.

3. The Commission's said report and order are arbitrary and in violation of previous rulings as to the duty of a common carrier by railroad to perform the service of placement of empty cars for load at, and removal of loaded cars from, point of loading, and placement of loaded car at, and removal of empty car from, point of unloading, within the plant of the petitioner.

4. There was no evidence upon which the Commission could find—

(a) That the respondents have complied with their obligation to petitioner under their rates for interstate transportation to deliver and receive carload freight when they place the cars containing said freight on the so-called interchange tracks described of record or remove the cars therefrom;

(b) That the service of moving cars beyond the so-called interchange tracks is a plant service;

(19) (c) That by the payment of an allowance to petitioner for service performed by it in moving cars containing interstate

shipments beyond the interchange tracks, respondents provide the means by which petitioner enjoys a preferential service not accorded to shippers generally;

(d) That to refund or remit a portion of the rates and charges collected or received as compensation for the transportation of property, as set forth in said supplemental report, is in violation of paragraph (7) of Section 6 of the Act.

5. The evidence on which the order is based shows conclusively that the terminal allowance paid by the respondent railroad company to petitioner is for a transportation service embraced within the service for which the respondent railroad company publishes, charges, and receives the rates named in its tariffs of freight charges filed with the Interstate Commerce Commission; that the said terminal allowance is no more than just and reasonable and, being published in the tariffs of the respondent railroad company, is just as binding upon the respondent railroad company as is any rate named in its tariffs to be collected for the transportation of property by it in interstate commerce; and when the extent of the service of the carrier in the receipt and delivery of freight to be performed for the line haul rate is made clear by the published tariffs of the carrier and by the course of business followed by the carrier as recited above,

(20) and when it is stated in a tariff of the carrier that an allowance is made to the shipper or receiver of the freight for the performance of a part of said service, and the amount of such allowance is stated, such tariff being duly published and established and in force, such service and such allowance can not be in violation of Section 6 of the Interstate Commerce Act.

6. The evidence wholly fails to show any violation of law by the petitioner or by the respondent railroad company in connection with the terminal allowance at petitioner's plant as above described.

7. The report and order were not entered after full hearing and due investigation; and petitioner was not accorded due notice and full hearing as required by the statute.

XIII. Further, petitioner shows that prior to 1905 the question had arisen as to the Commission's power over allowances to shippers for services performed and facilities furnished by them for carriers subject to the Interstate Commerce Act. In its annual report to the Congress in 1905 the Commission said:

"Terminal roads, elevator charges, and private cars.

"There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen to any case where the shipper is the owner of

(21) any of the facilities of transportation or performs any part of the transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private

car which conveys the property of the owner. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the commission should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is ex-
(22) tremely difficult of application, but nothing better appears to be available."

Thereupon on June 29, 1906, 34 Statute 584, Section 1 of the Interstate Commerce Act was amended so that the term "railroad" should include—

"all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

The section was further amended so that the term "transportation" includes—

"All services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, icing, storing, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor."

Section 6 was amended so as to require the schedules of rates filed by carriers to "state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may re-
quire, all privileges or facilities granted or allowed." Section
(23) 6 was further amended by the addition of the following to Paragraph (7): "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15 was amended by the addition of the following paragraph:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

The Commission has no power to prohibit defendant railroad companies from employing plaintiff to furnish services or from using plaintiff's facilities in the transportation of plaintiff's property. The Commission has power only to determine whether the amount of the allowance paid by defendant railroad companies to plaintiff for service and facilities is more than is just and rea-
(24) sonable for such services rendered and facilities furnished, and to fix a limit which shall not be exceeded in the payment therefor.

The Commission in its said order of May 14, 1935, forbidding any and all allowance to plaintiff for services rendered and facilities furnished exceeded its authority and acted arbitrarily; therefore, the said order is void and of no effect.

XIV. Petitioner has handled and will continue to handle for respondent Railroad Company loaded cars on which the terminal allowance payable as compensation for said handling is paid pursuant to the tariff of respondent carrier providing for such payment, and said service cannot be paid for or compensated except as authorized and provided by duly filed and published tariff. Unless the order of the Commission be set aside and the respondent be required to withdraw its cancelling tariff, plaintiff will be compelled to perform said service of transportation for the benefit of respondent Railroad Company but at its own cost and expense, without the possibility of payment being made by the respondent Railroad Company in the absence of tariff authority, thereby subjecting petitioner to irreparable loss and injury.

In consideration whereof and inasmuch as your petitioner has no adequate remedy at law, and may have relief only in a Court of Equity, petitioner prays that this petition be received and filed; that writs of subpoena be issued by the Clerk of the Court, as provided by law, commanding the United States of America and the Penn-
(25) sylvania Railroad Company to appear and defend this action; that notice hereof be given to the Attorney General of the United States and to the Interstate Commerce Commission that upon the filing of this bill the Judge of this Court call to his assistance two other Judges, one of whom shall be a Circuit Judge, and

that upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to said respondent carrier, the petitioner be granted an interlocutory injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order which requires respondent carrier to cease and desist on or before August 1, 1935, and thereafter to abstain from the practice in said order described; and that upon final hearing of this case, a decree be entered adjudging the said order to be in all respects null and void and permanently enjoining, annulling and setting aside the enforcement, operation, and execution of said order.

And petitioner further prays that a preliminary or interlocutory order or injunction be entered, requiring the railroad respondent to cancel the tariffs herein referred to, filed in alleged conformity with the said order of the Commission, and suspending the cancellation of the terminal allowance now being paid petitioner, until final determination of this cause, and that upon the final hearing herein, a decree be entered perpetually enjoining, suspending, annulling, and setting aside the said tariffs and requiring the same respondents to file new tariffs restoring the terminal allowances in effect
(26) on June 6, 1935, on interstate traffic handled by the petitioner at its said plant at Brackenridge, Pennsylvania, unless and until changed by agreement of the parties or by a lawful decision of the Interstate Commerce Commission.

Petitioner further prays, inasmuch as the purpose of the foregoing prayers for relief is to set aside the order of the Commission of June 7, 1935, and to restore the status quo of June 6, 1935, for such other and further orders or decrees as may be necessary to set aside said order of the Interstate Commerce Commission and to require the railroad respondents to vacate, annul, and set aside any and all action which may have been taken under and by reason of said order of the Commission, and to take such action as may be necessary to restore the parties and properties affected by said order to the status of June 6, 1935, and for such further and other relief in the premises as the nature of the case shall require, and to this court shall seem meet.

JOHN S. BURCHMORE,
WILLIAM W. COLLIN, JR.,
Solicitors for Petitioner.

WALTER, BURCHMORE & BELNAP,
1522 First National Bank Bldg., Chicago, Ill.
PATTERSON, GOEHRING, MCCLINTOCK & COLLIN,
982 Frick Bldg., Pittsburgh, Pa.

(27) [*Duly sworn to by James O. Carr, jurat omitted in printing.*]

(28) [Appendix A to petition omitted. Printed side page, 20 ante.]

(105) *Appendix B to petition*

Interstate Commerce Commission

Allegheny Steel Company Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Submitted October 17, 1934. Decided June 7, 1935

Carriers' compensation under their line-haul rates found not to include service for which allowance is paid. Payment, therefore, found to be unlawful.

Same appearances as in the original report.

Eleventh Supplemental Report of the Commission

Division 6, Commissioners McManamy, Lee, and Miller

By Division 6:

In the original report in this proceeding, Propriety of Operating Practices—Terminal Services, 209 I. C. C.—, certain principles were announced concerning the payment of allowances to industries for performing spotting service at their industrial plants, or the performance of such service by respondents in lieu thereof. This supplemental report pertains to an allowance paid by the Penn-
(106) sylvania Railroad Company to the Allegheny Steel Company for switching service performed by the latter company within its plant at Brackenridge, Pa.

The Allegheny Company manufactures steel and alloy products, and its properties comprise what constituted, prior to May 1929, the Allegheny Steel Company and the West Penn Steel Company. This industrial plant covers an area approximating 100 acres, of which about 75 are occupied by buildings and other structures. About 150 industrial tracks and sidings, aggregating some 10 miles in length, extend to 11 important points where freight cars are spotted for loading and unloading, to three scrap yards, and to five or more locations where cars are loaded and unloaded by aid of locomotive cranes.

The plant is bounded on the north by the main line of the Pennsylvania Railroad, on the south by the Allegheny River, and facilities for both rail and water transportation are available. Inbound and outbound cars loaded or empty are delivered or received on two inter-

change tracks about one-half mile in length, located between the plant property line and the Pennsylvania main track. Inbound cars handled at this plant average about 80 daily. The number handled outbound is not shown of record. The steel company owns seven locomotives, and performs its own spotting service, normally five switching locomotives being in active use. During about one-third of the average 24-hour period these locomotives are employed in intraplant switching, and the remainder of the time in moving cars to and from the interchange tracks. For the latter service
(107) respondent allows the steel company $1.07 per loaded car. This figure is based on costs in 1916 and was established as of July 15, 1930.

The steel company first applied for a switching allowance in 1917. Thereafter respondent began an extensive cost study, but before this undertaking was completed the railroad was transferred from private to Federal control, and on behalf of the United States Railroad Administration it was suggested that the steel company submit the question to this Commission for determination. Formal complaint was thereupon filed on July 3, 1919. In Allegheny Steel Co. v. Director General, 60 I. C. C. 575, 578, division 1 found:

"The facts of record are not deemed such as to support a finding of unreasonableness, but we find that in respect of interstate carload traffic moving between the trunk line and loading and unloading points within the limits of complainant's plant, the failure of the defendants to perform the switching and spotting service with their own motive power, or to make an allowance to complainant covering the cost of that service performed by it does and will for the future subject complainant to unjust discrimination as between it and similarly situated competitors in the Pittsburgh rate district for whom such services are performed by the defendants without additional charge or to whom allowances are made for the performance thereof. It does not appear that complainant has been
(108) pecuniarly damaged by reason of the alleged discrimination and reparation is denied."

After announcement of this decision, the carrier decided to perform the spotting service rather than pay an allowance, but the steel company at that time was not prepared to permit railroad locomotives to enter its plant, and an adjustment of the matter was delayed for several years. In the meantime about $10,000,000 were expended for changes and improvements in the plant facilities, which included a material enlargement of the track layout. In 1929 a request was made that respondent either perform the spotting service or grant an allowance, and the allowance already referred to was subsequently authorized.

In common with other iron and steel plants, the weighing service is a vital part of the industrial operations, and all carload shipments both inbound and outbound are weighed by the industry. The outbound cars are also weighed light. This weighing service is for the benefit and convenience of the steel company, although

respondent benefits to the extent that it is unnecessary for the railroad to weight outbound shipments. As announced in Propriety of Operating Practices—Terminal Services, supra, whenever a carrier is prevented from performing spotting service within a plant in an uninterrupted movement at its ordinary operating convenience, by reason of some disability on the part of the industry, the carrier has fulfilled its common-carrier obligation under its line-haul rates by the delivery and receipt of cars on reasonably convenient interchange tracks.

(109) A witness for the steel company confirmed the testimony given by him at the hearing in Allegheny Steel Co. v. Director General, supra, that any switching by respondent at this plant would necessarily be performed at the convenience of the steel company, and that expeditious and efficient spotting service is required. Such service was defined as the placement of cars when and as needed. In other words, switching service rendered at respondent's convenience might delay manufacturing activities, and it appears that the plant cannot be operated satisfactorily unless switching power is constantly available. Respondent is under no legal obligation to spot cars solely at the convenience of the steel company. Pittsburgh Forge & Iron Co. v. Director General, 59 I. C. C. 29; United States Cast Iron P. & F. Co. v. Director General, 57 I. C. C. 442; Stewart Furnace Co. v. Pennsylvania R. Co., 68 I. C. C. 528; Merchant Shipbuilding Corp. v. Pennsylvania R. Co., 61 I. C. C. 214; citing Car Spotting Charges, 34 I. C. C. 609, 617.

An operating witness for the Pennsylvania testified that the industry tracks will not accommodate the railroad switching locomotives operated in this locality. Smaller locomotives are in use elsewhere, but even if transferred and assigned to this plant they would necessarily be operated under the direction and orders of employees of the steel company. The small engines could not be otherwise employed in this section, and any idle locomotive time which might result from inactivity at the steel plant would add to the expense of the railroad.

(110) Satisfactory spotting service at this industrial plant necessitates many switching movements daily between the interchange tracks and the points of loading and unloading. It is apparent that the switching service performed in spotting cars greatly exceeds ordinary team-track or simple switching delivery and is in excess of that which may be lawfully required of respondent under its line-haul rates. Terminal Allowance to St. Louis Coke & Iron Co., 85 I. C. C. 591, 600.

We find that the existing line-haul rates of the Pennsylvania Railroad must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; that the transportation services which it is the duty of the carriers to perform for the steel company begin and end at the interchange tracks; and that the switching movements by the steel company between such

interchange tracks and points within its plant are plant services which it is not the duty of the respondent carrier to perform under its line-haul rates.

We further find that by the payment of an allowance for the service performed on interstate shipments beyond the interchange tracks described of record, the respondent carrier provides a means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act.

An appropriate order will be entered.

(111) ORDER

At a Session of the Interstate Commerce Commission, Division 6, held at its office in Washington, D. C., on the 7th day of June, A. D. 1935.

Allegheny Steel Company Terminal Allowance
Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The Pennsylvania Railroad Company to the Allegheny Steel Company for performance by the latter of spotting service within its industrial plant at Brackenridge, Pa., and the Commission having under date of May 14, 1935, made and filed a report, Propriety of Operating Practices—Terminal Services, 209, I. C. C. . . . ., containing its legal conclusions with respect to the general situation presented and the division having on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the Allegheny Steel Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the
(112) payment of said allowance The Pennsylvania Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That The Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 1, 1935, and thereafter to abstain from such unlawful practice.

By the Commission, division 6.

[SEAL] GEORGE B. MCGINTY,
Secretary.

106 [File endorsement omitted.]

(1) In United States District Court for the Western District of Pennsylvania

No. 3112 in Equity

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA
THE PENNSYLVANIA RAILROAD COMPANY

Petition

Filed July 25, 1935

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania:

Your petitioner, Pittsburgh Plate Glass Company, a corporation, presents this its petition against United States of America and The Pennsylvania Railroad Company; and thereupon petitioner respectfully states:

I. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, with principal office at Pittsburgh in said Commonwealth and in the Western District of Pennsylvania, and owning and operating a plant at Ford City, Pennsylvania, where it is now and for many years past has
(2) been engaged in the manufacture of plate glass and other glass products; and in the conduct of said business it receives at its plant large quantities of sand, coal, limestone, and other raw commodities and other materials, and ships large quantities of plate glass and related products from said plant.

II. Respondent The Pennsylvania Railroad Company is a common carrier of property by railroad between Ford City, Pennsylvania, and points in other states, and as such common carrier is subject to the Interstate Commerce Act, and owns and operates lines of railroad within Pennsylvania and in other states, and transports interstate freight for delivery to petitioner's plant at Ford City, Pennsylvania, and in like manner transports freight from said plant to destinations in other states.

III. Petitioner brings this suit in equity against the United States of America pursuant to an Act of Congress approved October 22, 1913, 38 statutes at large 219 (28 U. S. C. A. Sec. 41, subsections 45, 46, 47), and under the general equity jurisdiction of this Court, to enjoin, set aside and annul a certain report and order entered by the Interstate Commerce Commission on June 25, 1935, in a proceeding known as Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, said report and order being subtitled Seventeenth Supplemental Report of the Commission, Pittsburgh Plate Glass Company Terminal

(3) Allowance; and to enjoin and restrain the respondent carrier from complying with the aforesaid order of the Commission entered June 25, 1935.

IV. The said Commission, on its own motion, entered an order under date of July 6, 1931, without any complaint having been made to or petition filed with said Commission, according to petitioner's information and belief, which said order was in words and figures as follows:

"ORDER

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July A. D. 1931.

"Ex Parte No. 104

"Practices of Carriers Affecting Operating Revenues or Expenses

"Sections 12 and 15 (a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act which affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

"It is ordered, That the commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and investigation into and concerning practices of carriers by
(4) railroad subject to the interstate commerce act which affect operating revenues or expenses;

"It is further ordered, That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

"And it is further ordered, That this proceeding be assigned for hearing at such times and places and with respect to such practices as the commission may hereafter direct.

"By the Commission.

[SEAL] "GEORGE B. MCGINTY,
"Secretary."

Petitioner presumes that aforesaid order was served upon all so-called class I carriers by railroad subject to the Act, and therefore avers that said order was served upon each of the carrier respondents.

Subsequently, the Commission issued its notice under date of August 13, 1931, entitled: "Ex Parte No. 104, Part II, Terminal Services of Class I Carriers. Notice of Information to be sought at hearings." In said notice, the Commission ostensibly defined "in scope and restriction" said Part II of the aforesaid general inquiry as intended to establish facts concerning various services, charges

and practices of carriers subject to the Act, including, among others, terminal services and practices in the receipt and delivery of carload freight, including the spotting of cars, and all services and privileges, except transit and lighterage, incident to said

(5) terminal services within the meaning of Section 6 of the Interstate Commerce Act, which affect the measure of the transportation service performed at the line-haul rates and the value of such services to the consignors and consignees; the extent to which the line-haul rates include charges for such services; allowances and absorptions made out of the line-haul rates; and the extent to which such services reach beyond the carriers' terminals to particular locations on private tracks, sidings, industrial plant tracks, and on the rails of industrial common carriers.

The Commission conducted extended hearings in said proceeding at numerous places, at various times from September 15, 1931 to November 21, 1932; thereafter a "proposed report" was prepared by the Commission's Director of Service, W. P. Bartel, before whom the hearings had been held; exceptions were filed by numerous parties; and oral argument before the Commission was had. Thereafter the Commission issued its report, dated May 14, 1935, without order, which report has subsequently been described by the Commission as its original report in which it reviewed the subject matter of the inquiry generally and set forth its legal conclusions.

A copy of said original report of the Commission, marked Appendix A, and a copy of said Seventeenth Supplemental report, marked Appendix B, are attached hereto and are made a part hereof as fully as though set forth at length herein.

On July 24, 1935 petitioner filed with the Commission its petition for vacation of said order of June 25, 1935, upon various errors of fact and law alleged therein. Petitioner is not advised that the Commission has yet acted upon said petition.

(6) V. The uniform custom and practice of all common carriers, in the State of Pennsylvania and in other states throughout the Union, including the carrier named as respondent in this bill, is to state in their rate tariffs published and filed with the Commission the city, town or other station locality to and from which they undertake to transport freight at the rates and charges in such tariffs stated, without stating the precise spot in such city, town or station locality at which they undertake to receive or deliver such freight. Under such tariffs it is and for many years has been the uniform custom and practice to include within the carload freight rates established and maintained for the transportation of carload freight the complete service comprehended in (a) the providing and furnishing of a suitable car for transportation and the placement of the car at any point reasonably accessible and convenient for loading on standard gauge tracks serving any and all idustrial plants; and after the freight has been loaded in said cars by consignor, to remove the same and transport the goods therein to destination; and (b) to deliver the carload freight by placing the car,

wherein such freight is transported, at any point reasonably convenient for the unloading and removal of the freight from the car on the standard gauge tracks serving any and all industrial plants and to remove the empty car therefrom after the freight has been received and unloaded by the consignee. It is customary for railroads for various reasons sometimes to employ other railroad companies to complete their undertaking to spot the cars as aforesaid, and to pay such other railroads for such service, and
(7) sometimes to employ the shipper or receiver of freight to complete said undertaking to spot the cars as aforesaid and in such cases to compensate by payments termed allowances to such shippers and receivers of freight for such service. Respondent carrier has followed such customs generally in serving shippers and receivers of freight over its lines of road.

Pursuant to such custom, respondent the Pennsylvania Railroad Company has always provided in its tariffs that, for the compensation afforded by its established rates for transportation between designated cities, towns, or other station localities, it would deliver and receive carload freight by the placement of the cars at any reasonable and convenient point for the loading or unloading thereof on the tracks serving the said plant of petitioner at Ford City, Pennsylvania, the same as at all plants, industries, and business establishments adjacent to its railroad and served by so-called private or industrial sidings.

The duly filed and published tariffs of respondent The Pennsylvania Railroad Company and all other carriers in the Commonwealth of Pennsylvania and in other states of the United States, as in effect now and for more than twenty years past, name rates for transportation covering the complete services described in this paragraph, with respect to carload freight moving to and from any and all railroad terminals and industries, plants, warehouses, or other business establishments; and the same rates have been applicable and have been applied by all of said carriers, whether carload shipments of freight originated on so-called public team tracks or on so-called private side tracks serving the plants, industries, and other business establishments and whether such shipments were delivered on so-called public team tracks or on so-called private side tracks as aforesaid.

(8)

VI. The record in the aforesaid investigation by the Commission in Ex Parte 104, Part II, contains abundant testimony by numerous witnesses supporting the averments in paragraph V hereof; and there is no evidence in said record to the contrary.

There is no evidence in said record that the carriers in serving any industry, plant, warehouse, or other business establishment have sought to limit their duty or terminate their obligation under the line-haul rates by placement of cars at any point short of or intermediate to the place mutually agreed upon with the shipper or consignee as reasonable and convenient for the loading or unloading of carload freight.

VII. Section 1 of the Interstate Commerce Act, U. S. Code, title 49, Sec. 1, 41 Stat. L., 474, provides:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, * * *.

"(2) The provisions of this Act shall also apply to such transportation of passengers and property * * * but only in
(9) so far as such transportation * * * takes place within the United States, * * *.

"(3) The term 'common carrier' as used in this Act shall include * * * all persons, natural or artificial, engaged in such transportation * * * as aforesaid as common carriers for hire. * * * The term 'railroad' as used in this Act shall include all * * * the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *

"(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of * * * property to provide and furnish such transportation upon reasonable request therefor, * * *."

(10) Section 6 provides:

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the place between which property * * * will be carried, * * * and shall also state separately all terminal charges, * * * and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the * * * shipper, or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. * * *

"(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of * * * property, as defined in this Act, unless the rates, * * * and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates, * * * and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, * * * and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15, paragraph 13, provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for
(12) under this section."

VIII. Petitioner Pittsburgh Plate Glass Company for many years past has rendered the transportation service and furnished the instrumentalities employed in moving carloads of freight between the rails of respondent The Pennsylvania Railroad Company adjacent to petitioner's plant, and convenient points of loading or unloading in said plant. On August 4, 1919, petitioner filed with the Interstate Commerce Commission its complaint alleging that the defendant The Pennsylvania Railroad Company had failed to perform said service or to pay to petitioner the cost incurred by it in its performance thereof, and praying for relief in the premises. After hearing the Commission rendered its decision June 18, 1920, Pittsburgh Plate Glass Co. v. Director General, 58 I. C. C. 81, wherein the Commission found, at page 84:

"Upon consideration of the whole record we are of the opinion and find that the failure of the defendant to make an allowance to complainant for performing the switching and spotting service on interstate carload shipments moving between the trunk line and loading and unloading points within the limits of complainant's plant has not been shown to be unreasonable, but that the failure of defendant to perform such service on interstate carload shipments with its own motive power or to make an allowance to complainant

covering the cost of that service performed by it, while at the same time performing such services without additional charge or making an allowance for the performance of such service to complain-
(13) ant's competitors, does and will for the future subject complainant to undue preference and advantage."

Pursuant to said decision, respondent The Pennsylvania Railroad Company, electing at the time to perform the service rather than pay the allowance, made its offer so to do, which offer petitioner then declined because of plant construction activities then in progress. Subsequently, petitioner on July 1, 1927, made request upon respondent to switch cars to and from unloading and loading points, and respondent performed such service for several months, after which and on September 14, 1927, a tariff was published by respondent providing payment of an allowance of 65 cents per loaded car for performance of said service by petitioner.

IX. At all times since September 14, 1927, the duly filed and published tariff of respondent the Pennsylvania Railroad Company has been in force, providing payment of allowance by respondent to petitioner for the latter's transportation service of moving and placing cars at loading and unloading points in its plant, and said tariff currently effective provides as follows:

(14) The Pennsylvania Railroad Company

(Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and ~~East~~)

West Jersey and Seashore Railroad Company

Local Freight Tariff

Terminal allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached via The Pennsylvania Railroad Company

On all carload revenue shipments, also on cars containing 12,000 pounds or more of less carload revenue freight destined to or coming from the plant of the Pittsburgh Plate Glass Company, Ford City, Pa., on which the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company, the Pittsburgh Plate Glass Company will be allowed, out of the current Ford City, Pa., rate, 65 cents per car.

When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car. The maximum allowance for each additional car in the series or lot will be fifty (50) per cent of the maximum for the first car.

On cars containing excess shipments of carload freight
(15) handled under Rule 24 of Official Classification, I. C. C.—O. C. No. 48, P. S. C.—Pa. O. C. No. 48 (D. T. Lawrence, Agent), supplements thereto or reissues thereof, the maximum allow-

ance will be fifty (50) per cent of the maximum allowed on the first car.

The foregoing arrangement does not include traffic handled under switching charges as named in G. O.—I. C. C. No. 14296, G. O.—P. S. C.—Pa.—No. 4798 (Agent's Index No. 54), supplements thereto or reissues thereof; nor on shipments of Slag, Ashes, or other refuse material for wasting, as named in Agent B. T. Jones' I. C. C. No. 1695, P. S. C.—Pa.—No. 97, supplements thereto or reissues thereof.

The foregoing tariff also contains provision excluding coal, coke, and ore but a similar tariff provides for like allowance on coal and coke.

X. Respondent has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a tariff to become effective August 22, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner, as follows:

(16) Cancellation Notice

The Pennsylvania Railroad Company

(Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East)

Local Freight Tariff

Terminal Allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached by The Pennsylvania Railroad Company is hereby cancelled

Allowance Discontinued

Issued in compliance with Seventeenth Supplemental Report and Order of the Interstate Commerce Commission in Ex-Parte 104, Part 2, decided June 25, 1935.

Similar tariff has been filed with the Interstate Commerce Commission and Public Service Commission of Pennsylvania cancelling the tariff which provides for allowance on coal and coke, effective the same date.

(17) Respondent has given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of June 25, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent would not have filed the aforesaid tariff cancelling said allowance were it not for the fear of incurring penalties for failure to comply with said order.

XI. The aforesaid order of the Commission instituting its investigation Ex Parte 104 on its own motion and without formal pleading, as set forth in paragraph IV of this petition, was not based upon any complaint or application of any sort submitted to the Commission by any person, either carrier or shipper, that the practice above described as in force at petitioner's plant was unreasonable, discriminatory, or in any

way in violation of law, so far as known to petitioner. In the branch of said proceeding designated Part II, Terminal Services of Class I Carriers, in which the testimony relative to petitioner's plant was taken, no party, either carrier or shipper, presented any testimony purporting to show that said practice at petitioner's plant was unreasonable or discriminatory or otherwise in violation of law in any respect. Petitioner's representative appeared at said hearing in response to a request addressed to petitioner by the Secretary of the Commission, and said representative in response to the call of the presiding Director of Service of the Commission became a witness and presented testimony describing said practice. No other testimony as to said practice at petitioner's plant was presented except on behalf of respondent The Pennsylvania Railroad
(18) Company, which respondent was a party to said proceeding of investigation solely by virtue of the Commission's order instituting such investigation and making all so-called Class I railroads of the United States respondents therein, and said respondent The Pennsylvania Railroad Company presented its testimony in support of the existing practice and tariffs.

XII. The said report and order of June 25, 1935, as above set forth, is unlawful and void in the following respects:

1. The Commission was without authority to make the said order.

2. The Commission failed to make requisite findings sufficient to support its order.

3. The Commission's said report and order are arbitrary and in violation of previous rulings as to the duty of a common carrier by railroad to perform the service of placement of empty cars for load at, and removal of loaded cars from, point of loading, and placement of loaded car at, and removal of empty car from, point of unloading, within the plant of the petitioner.

4. There was no evidence upon which the Commission could find—

(a) That the respondents have complied with their obligation to petitioner under their rates for interstate transportation to deliver and receive carload freight when they place the cars containing said freight on the so-called interchange tracks described of record or remove the cars therefrom;

(b) That the service of moving cars beyond the so-called interchange tracks is a plant service;

(19) (c) That by the payment of an allowance to petitioner for service performed by it in moving cars containing interstate shipments beyond the interchange tracks, respondents provide the means by which petitioner enjoys a preferential service not accorded to shipper generally;

(d) That to refund or remit a portion of the rates and charges collected or received as compensation for the transportation of property, as set forth in said supplemental report, is in violation of paragraph (7) of Section 6 of the Act.

5. The evidence on which the order is based shows conclusively that the terminal allowance paid by the respondent railroad com-

pany to petitioner is for a transportation service embraced within the service for which the respondent railroad company publishes, charges and receives the rates named in its tariffs of freight charges filed with the Interstate Commerce Commission; that the said terminal allowance is no more than just and reasonable and, being published in the tariffs of the respondent railroad company, is just as binding upon the respondent railroad company as is any rate named in its tariffs to be collected for the transportation of property by it in interstate commerce; and when the extent of the service of the carrier in the receipt and delivery of freight to be performed for the line haul rate is made clear by the published tariffs of the carrier and by the course of business followed by the carrier as recited above, and when it is stated in a tariff of the carrier that
(20) an allowance is made to the shipper or receiver of the freight for the performance of a part of said service, and the amount of such service, and the amount of such allowance is stated, such tariff being duly published and established and in force, such service and such allowance can not be in violation of Section 6 of the Interstate Commerce Act.

6. The evidence wholly fails to show any violation of law by the petitioner or by the respondent railroad company in connection with the terminal allowance at petitioner's plant as above described.

7. The report and order were not entered after full hearing and due investigation; and petitioner was not accorded due notice and full hearing as required by the statute.

XIII. Further, petitioner shows that prior to 1905 the question had arisen as to the Commission's power over allowances to shippers for services performed and facilities furnished by them for carriers subject to the Interstate Commerce Act. In its annual report to the Congress in 1905 the Commission said:

"Terminal roads, elevator charges, and private cars.

"There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen to any case where the shipper is the owner of any of the facilities of transportation or performs any part of the
(21) transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be

a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the commission should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would
(22) not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

Thereupon on June 29, 1906, 34 Statute 584, Section 1 of the Interstate Commerce Act was amended so that the term "railroad" should include—

"all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

The section was further amended so that the term "transportation" includes—

"All services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, icing, storing, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor."

Section 6 was amended so as to require the schedules of rates filed by carriers to "state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed." Section
(23) 6 was further amended by the addition of the following to Paragraph (7): "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15 was amended by the addition of the following paragraph:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use

of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

The Commission has no power to prohibit respondent railroad company from employing petitioner to furnish services or from using petitioner's facilities in the transportation of petitioner's property. The Commission has power only to determine whether the amount of the allowance paid by respondent railroad company to petitioner for service and facilities is more than is just and
(24) reasonable for such services rendered and facilities furnished, and to fix a limit which shall not be exceeded in the payment therefor.

The Commission in its said order of June 25, 1935, forbidding any and all allowance to petitioner for services rendered and facilities furnished, exceeded its authority and acted arbitrarily; therefore, the said order is void and of no effect.

XIV. Petitioner has handled and will continue to handle for respondent Railroad Company loaded cars on which the terminal allowance payable as compensation for said handling is paid pursuant to the tariff of respondent carrier providing for such payment, and said service cannot be paid for or compensated except as authorized and provided by duly filed and published tariff. Unless the order of the Commission be set aside and the respondent be required to withdraw its cancelling tariff, plaintiff will be compelled to perform said service of transportation for the benefit of respondent Railroad Company but at its own cost and expense, without the possibility of payment being made by the respondent Railroad Company in the absence of tariff authority, thereby subjecting petitioner to irreparable loss and injury.

In consideration whereof and inasmuch as your petitioner has no adequate remedy at law, and may have relief only in a Court of Equity, petitioner prays that this petition be received and filed; that writs of subpoena be issued by the Clerk of the Court, as provided by law, commanding the United States of America and the
(25) Pennsylvania Railroad Company to appear and defend this action; that notice hereof be given to the Attorney General of the United States and to the Interstate Commerce Commission; that upon the filing of this bill the Judge of this Court call to his assistance two other Judges, one of whom shall be a Circuit Judge, and that upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to said respondent carrier, the petitioner be granted an interlocutory injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order which requires respondent carrier to cease and desist on or before August 22, 1935, and thereafter to abstain from the practice in said order described; and that upon final hearing of this case, a decree be entered adjudg-

ing the said order to be in all respects null and void and permanently enjoining, annulling, and setting aside the enforcement, operation, and execution of said order.

And petitioner further prays that a preliminary or interlocutory order or injunction be entered, requiring the railroad respondent to cancel the tariffs herein referred to, filed in alleged conformity with the said order of the Commission, and suspending the cancellation of the terminal allowance now being paid petitioner, until final determination of this cause, and that upon the final hearing herein, a decree be entered perpetually enjoining, suspending, annulling and setting aside the said tariffs and requiring the said respondent to file new tariffs restoring the terminal allowances
(26) in effect on June 24, 1935, on interstate traffic handled by the petitioner at its said plant at Ford City, Pennsylvania, unless and until changed by agreement of the parties or by a lawful decision of the Interstate Commerce Commission.

Petitioner further prays, inasmuch as the purpose of the foregoing prayers for relief is to set aside the order of the Commission of June 25, 1935, and to restore the status quo of June 24, 1935, for such other and further orders or decrees as may be necessary to set aside said order of the Interstate Commerce Commission and to require the railroad respondents to vacate, annul and set aside any and all action which may have been taken under and by reason of said order of the Commission, and to take such action as may be necessary to restore the parties and properties affected by said order to the status of June 24, 1935, and for such further and other relief in the premises as the nature of the case shall require, and to this court shall seem meet.

JOHN S. BURCHMORE,
WILLIAM W. COLLIN, JR.,
Solicitors for Petitioner.

WALTER, BURCHMORE & BELNAP,
1522 First National Bank Bldg., Chicago, Ill.
PATTERSON, GOEHRING, McCLINTOCK & COLLIN,
928 Frick Bldg., Pittsburgh, Pa.

(27) [*Duly sworn to by H. B. Higgins, jurat omitted in printing.*]

(28) [Appendix A to petition omitted. Printed side page; 20 ante.]

(105) *Appendix B to petition*

Interstate Commerce Commission

Pittsburgh Plate Glass Company Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Submitted October 17, 1934. Decided June 25, 1935

Service performed by industrial locomotives beyond the present points of interchange found not to be a service for which the carrier is compensated in its interstate line-haul rates. Payment of an allowance for that service found to be unlawful.

Same appearances as in the original report.

SEVENTEENTH SUPPLEMENTAL REPORT OF THE COMMISSION

Division 6, Commissioners McManamy, Lee, and Miller.

By Division 6:

In the original report in this proceeding, Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, certain principles were announced concerning the payment of allowances to industries for performing spotting service at their industrial plants, or the performance of such service by respondents in lieu of payment.

(106) This supplemental report pertains to an allowance of 65 cents per loaded car, paid by The Pennsylvania Railroad Company to the Pittsburgh Plate Glass Company for spotting service performed by the latter within its plant at Ford City, Pa., approximately 30 miles north of Pittsburgh, Pa.

This industrial plant has been in operation for many years. Its property stretches northward and southward a little less than one-half mile, and in width ranges from about 120 to 280 feet. On the west the property is bounded by the Allegheny River. The eastern property line is paralleled by a line of the Pennsylvania which extends in a northerly direction from Pittsburgh through Ford City to Buffalo, N. Y. No other trunk line railroad serves this plant. A large number of buildings and other structures are included in the plant facilities. Standard-gage industry tracks, aggregating between 8 and 9 miles in length, extend to a substantial number of points throughout the plant where freight cars are spotted to permit loading and unloading. A few spotting points are reached by short spur tracks which project from sidings of the Pennsylvania. One of the industry tracks over which interchange cars are moved has a curvature of 25 degrees, but other tracks used for this pur-

pose can be negotiated by an ordinary railroad locomotive. The motive power of the glass company consists of two engines, and approximately one-third of the total switching over the industry tracks is composed of intraplant movements.

East of the property the Pennsylvania maintains two sid-
(107) ings which serve as interchange tracks for freight cars. Inbound traffic is placed on a siding about one-fourth mile in length which connects with an industry track located toward the northern end of the plant. Outbound shipments leave the plant near the southern end of the property, and are placed on a siding which approximates one mile in length. This longer track is also used by other industries at Ford City for outgoing shipments.

Freight consigned to the glass company is composed chiefly of coal, sand, limestone, soda ash, plaster, paper, straw, and acid. Outbound shipments are largely plate glass. Railroad tonnage in the years 1929, 1930, and 1931 amounted to 6,017, 4,043, and 3,396 carloads, respectively, and about 70 to 75 percent consisted of inbound raw materials. The switching of cars between the interchange tracks and points of loading and unloading within the plant is performed by the industry with its own motive power. Inbound shipments are weighed by the glass company.

On August 4, 1919, the glass company filed with this Commission a complaint, No. 10806, and therein alleged:

"that for more than two years past the defendant carrier has placed inbound interstate carload shipments upon and removed like shipments from interchange tracks adjacent to the plant; that complainant has performed the classification service and the switching and spotting necessary to complete the delivery of the inbound shipments and effect the defendant carrier's receipt of those out-
(108) bound; and that, while complainant's tracks have been and are accessible to and susceptible of operation by the line-haul carrier, the defendants have wholly failed to perform the switching and spotting thereon, or to pay complainant its cost of performing such service for them, although performing such services at competing plants at certain named points and without charge in addition to the line-haul rates."

The report in which the decision of Division 1 was announced, Pittsburgh Plate Glass Co. v. Director General, 58 I. C. C. 81, contains the following comments and findings at page 84:

"In determining the reasonableness of the practice of the carrier the real issue is whether the service performed by complainant is one which ought to be done by the carrier as a substitute for delivery on its own tracks, or one reasonably contemplated at the line-haul rate. * * *

"* * * we are of opinion and find that the failure of the defendant to make an allowance to complainant for performing the switching and spotting service on interstate carload shipments moving between the trunk line and loading and unloading points within the limits of complainant's plant has not been shown to be unreason-

able, but that the failure of defendant to perform such service on interstate carload shipments with its own motive power or to make an allowance to complainant covering the cost of that service performed by it, while at the same time performing such services
(109) without additional charge or making an allowance for the performance of such service to complainant's competitors, does and will for the future subject complainant to undue prejudice and accord to its competitors undue preference and advantage."

That case was decided on June 18, 1920. Thereafter the Pennsylvania formally offered to perform the spotting service, but because of construction activities then in progress within the plant the offer was not accepted and the glass company continued to do its own switching. On July 1, 1927, when the several industry tracks were ready for operation, the glass company requested the Pennsylvania to switch inbound and outbound interchange cars to and from unloading and loading points. Accordingly, such service was instituted on August 2, 1927, and was continued to September 11, 1927. The railroad switching service proved to be unsatisfactory, and the industry performed its own spotting service without compensation from respondents during the period September 11 to 14, 1927. Effective on the latter date, a tariff was published by respondent, authorizing an allowance of 65 cents per loaded car, and this amount has since been paid. This allowance is the result of negotiations between the parties, and is materially less than it would cost respondent to perform the spotting service. In Pittsburgh Plate Glass Co. v. Director General, supra, it was found that respondent did the switching and spotting service at this glass plant prior to the year 1903, but the service became unsatisfactory and was a hindrance to operations, and the industry took it over with its own motive power.

(110) When the hearing in the instant proceeding was held, the operations at the glass plant were subnormal and one industry locomotive, engaged in intraplant and interchange switching, was employed but about three hours daily. Under normal conditions it requires 5 to 6 hours each day for one locomotive and crew to switch inbound and outbound interchange cars to and from unloading and loading points, but it is essential that this switching be done at periods designated by the glass company, and the latter desires that the plant receive service between 10 a. m. and 4 p. m. To provide such service respondent would be obligated to assign to the plant a railroad locomotive to be operated under the direction of the industry for a substantial period each day. The switching of cars for other shippers in this vicinity is performed by the crews of local freight trains.

This industrial plant is an illustration of those which cannot be operated efficiently unless one or more locomotives are constantly available during specified periods to perform switching and spotting of cars when and as desired. No obligation rests upon the carrier to perform switching and spotting service solely at the convenience

of the industry. Merchant Shipbuilding Corp. v. Pennsylvania R. Co., 61 I. C. C. 214, 217. Service of this character is not covered by respondent's interstate line-haul rates. Instead the transportation which the respondent carrier is obligated to provide under such rates must be considered as ended when it has rendered the equivalent
(111) of team track or simple switching service by the delivery and receipt of cars on interchange tracks reasonably convenient to the industry. Pittsburgh Forge & Iron Co. v. Director General, 59 I. C. C. 29.

We find that the respondent carrier has complied with its legal obligations under the interstate line-haul rates by the delivery and receipt of carload freight on the interchange tracks described of record; that the payment of an allowance by respondent for the performance of service beyond said interchange tracks provides the means by which the industry enjoys a preferential service not accorded to shippers generally; and that by such payment the respondent carrier refunds or remits a portion of the rates or charges collected or received as compensation in the interstate transportation of property, in violation of section 6 (7) of the act.

An appropriate order will be entered.

ORDER

At a Session of the Interstate Commerce Commission, Division 6, held at its office in Washington, D. C., on the 25th day of June, A. D. 1935.

Pittsburgh Plate Glass Company Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Upon further consideration of the record in this proceeding
(112) concerning the lawfulness and propriety of the allowances paid by the Pennsylvania Railroad Company to the Pittsburgh Plate Glass Company, for performance by the latter of spotting service within its plant at Ford City, Pa., and the Commission having under date of May 14, 1935, made and filed a report in Propriety of Operating Practices—Terminal Services, ... I. C. C. . . . ., containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the Pittsburgh Plate Glass Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance the

Pennsylvania Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports;

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 22, 1935, and thereafter to abstain from such unlawful practice,

And it is further ordered, That the order entered in No. 10806, on June 18, 1920, in respect of switching and spotting service at the plant of the Pittsburgh Plate Glass Company, Ford City, Pa., be, and it is hereby, vacated and set aside.

By the Commission, Division 6.

[SEAL] GEORGE B. McGINTY,
Secretary.

107 [File endorsement omitted.]

(1) In United States District Court for the Western District of Pennsylvania

No. 2113 in Equity

WEIRTON STEEL COMPANY

v.

UNITED STATES OF AMERICA

THE PENNSYLVANIA RAILROAD COMPANY

Petition filed July 25, 1935

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania:

Your petitioner, Weirton Steel Company, a corporation, presents this its petition against United States of America and The Pennsylvania Railroad Company; and thereupon petitioner respectfully states:

I. Petitioner is a corporation duly organized and existing under the laws of the State of Delaware, with principal office at Pittsburgh in the Commonwealth of Pennsylvania and in the Western District of Pennsylvania, and owning and operating a plant at Weirton, West Virginia, where it is now and for many years past has been
(2) engaged in the manufacture of steel products; and in the conduct of said business it receives at its plant large quantities of ore, coal, limestone, and other raw commodities and other materials, and ships large quantities of manufactured steel and related products from said plant.

II. Respondent, The Pennsylvania Railroad Company, is a common carrier of property by railroad between Weirton, West Virginia, and points in other states, and as such common carrier is sub-

ject to the Interstate Commerce Act, and owns and operates lines of railroad within Pennsylvania and in other states, and transports interstate freight for delivery to petitioner's plant at Weirton, West Virginia, and in like manner transports freight from said plant to destinations in other states.

III. Petitioner brings this suit in equity against the United States of America pursuant to an Act of Congress approved October 22, 1913, 38 statutes at large 219 (28 U. S. C. A., Sec. 41, subsections 45, 46, 47), and under the general equity jurisdiction of this Court, to enjoin, set aside, and annul a certain report and order entered by the Interstate Commerce Commission on June 24, 1935, in a proceeding known as Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, said report and order being subtitled Fifteenth Supplemental Report of the Commission, Weirton Steel Company Terminal Allowance;

(3) and to enjoin and restrain the respondent carrier from complying with the aforesaid order of the Commission entered June 24, 1935.

IV. The said Commission, on its own motion, entered an order under date of July 6, 1931, without any complaint having been made to or petition filed with said Commission, according to petitioner's information and belief, which said order was in words and figures as follows:

"ORDER

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July, A. D. 1931.

"Ex Parte No. 104

"Practices of Carriers Affecting Operating Revenues or Expenses

"Sections 12 and 15 (a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act which affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

"It is ordered, That the commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and

(4) investigation into and concerning practices of carriers by railroad subject to the interstate commerce act which affect operating revenues or expenses;

"It is further ordered, That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

"And it is further ordered, That this proceeding be assigned for hearing at such times and places and with respect to such practices as the commission may hereafter direct.

"By the Commission.

[SEAL] "GEORGE B. MCGINTY,
"*Secretary.*"

Petitioner presumes that aforesaid order was served upon all so-called class I carriers by railroad subject to the Act, and therefore avers that said order was served upon each of the carrier respondents.

Subsequently, the Commission issued its notice under date of August 13, 1931, entitled: "Ex Parte No. 104, Part II, Terminal Services of Class I Carriers. Notice of Information to be sought at hearings." In said notice the Commission ostensibly defined "in scope and restriction" said Part II of the aforesaid general inquiry as intended to establish facts concerning various services, charges, and practices of carriers subject to the Act, including, among others, terminal services and practices in the receipt and delivery of carload freight, including the spotting of cars, and all services and privileges, except transit and lighterage, incident to said ter-
(5) minal services within the meaning of Section 6 of the Interstate Commerce Act, which affect the measure of the transportation service performed at the line-haul rates and the value of such services to the consignors and consignees; the extent to which the line-haul rates include charges for such services; allowances and absorptions made out of the line-haul rates; and the extent to which such services reach beyond the carriers' terminals to particular locations on private tracks, sidings, industrial plant tracks, and on the rails of industrial common carriers.

The Commission conducted extended hearings in said proceeding at numerous places, at various times from September 15, 1931, to November 21, 1932; thereafter a "proposed report" was prepared by the Commission's Director of Service, W. P. Bartel, before whom the hearings had been held; exceptions were filed by numerous parties; and oral argument before the Commission was had. Thereafter the Commission issued its report, dated May 14, 1935, without order, which report has subsequently been described by the Commission as its original report in which it reviewed the subject matter of the inquiry generally and set forth its legal conclusions.

A copy of said original report of the Commission marked Appendix A, and a copy of said fifteenth supplemental report, marked Appendix B, are attached hereto and are made a part hereof as fully as though set forth at length herein.

On July 24, 1935, petitioner filed with the Commission its petition for vacation of said order of June 24, 1935, upon various errors of fact and law alleged therein. Petitioner is not advised that the Commission has yet acted upon said petition.

(6) V. The uniform custom and practice of all common carriers, in the State of Pennsylvania and in other states throughout the Union, including the carrier named as respondent in this bill, is

to state in their rate tariffs published and filed with the Commission the city, town, or other station locality to and from which they undertake to transport freight at the rates and charges in such tariffs stated, without stating the precise spot in such city, town, or station locality at which they undertake to receive or deliver such freight. Under such tariffs it is and for many years has been the uniform custom and practice to include within the carload freight rates established and maintained for the transportation of carload freight the complete service comprehended in (a) the providing and furnishing of a suitable car for transportation and the placement of the car at any point reasonably accessible and convenient for loading on standard gauge tracks serving any and all industrial plants; and after the freight has been loaded in said cars by consignor, to remove the same and transport the goods therein to destination; and (b) to deliver the carload freight by placing the car, wherein such freight is transported, at any point reasonably convenient for the unloading and removal of the freight from the car on the standard gauge tracks serving any and all industrial plants and to remove the empty car therefrom after the freight has been received and unloaded by the consignee. It is customary for railroads for various reasons sometimes to employ other railroad companies to complete their undertaking to spot the cars as aforesaid, and to pay
(7) such other railroads for such service, and sometimes to employ the shipper or receiver of freight to complete said undertaking to spot the cars as aforesaid and in such cases to compensate by payments termed allowances to such shippers and receivers of freight for such service. Respondent carrier has followed such customs generally in serving shippers and receivers of freight over its lines of road.

Pursuant to such custom, respondent the Pennsylvania Railroad Company has always provided in its tariffs that, for the compensation afforded by its established rates for transportation between designated cities, towns, or other station localities, it would deliver and receive carload freight by the placement of the cars at any reasonable and convenient point for the loading or unloading thereof on the tracks serving the said plant of petitioner at Weirton, West Virginia, the same as at all plants, industries and business establishments adjacent to its railroad and served by so-called private or industrial sidings.

The duly filed and published tariffs of respondent The Pennsylvania Railroad Company and all other carriers in the Commonwealth of Pennsylvania and in other states of the United States, as in effect now and for more than twenty years past, name rates for transportation covering the complete services described in this paragraph, with respect to carload freight moving to and from any and all railroad terminals and industries, plants, warehouses, or other business establishments; and the same rates have been applicable and have been applied by all of said carriers, whether carload
(8) shipments of freight originated on so-called public team

tracks or on so-called private side tracks serving the plants, industries and other business establishments and whether such shipments were delivered on so-called public team tracks or on so-called private side tracks as aforesaid.

VI. The record in the aforesaid investigation by the Commission in Ex Parte 104, Part II, contains abundant testimony by numerous witnesses supporting the averments in paragraph V hereof; and there is no evidence in said record to the contrary.

There is no evidence in said record that the carriers in serving any industry, plant, warehouse, or other business establishment have sought to limit their duty or terminate their obligation under the line-haul rates by placement of cars at any point short of or intermediate to the place mutually agreed upon with the shipper or consignee as reasonable and convenient for the loading or unloading of carload frieght.

VII. Section 1 of the Interstate Commerce Act, U. S. Code, title 49, Sec. 1, 41 Stat. L., 474, provides:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, * * *.

"(2) The provisions of this Act shall also apply to such transportation of passengers and property * * * but only in
(9) so far as such transportation * * * takes place within the United States, * * *

"(3) The term 'common carrier' as used in this Act shall include * * * all persons, natural or artificial, engaged in such transportation * * * as aforesaid as common carriers for hire. * * * The term 'railroad' as used in this Act shall include all * * * the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *

"(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of * * * property to provide and furnish such transportation upon reasonable request therefor, * * *."

(10) Section 6 provides:

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property * * * will be carried, * * * and shall also state separately all terminal charges, * * * and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the * * * shipper, or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities in this Act. * * *

"(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of * * * property, as defined in this Act, unless the rates, * * * and charges upon

(11) which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates, * * * and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, * * * and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15, paragraph 13, provides:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

(12) VIII. For many years past respondent The Pennsylvania Railroad Company has rendered and is now rendering the transportation service of moving carloads of freight to and from points of loading and unloading in petitioner's plant. In 1921,

respondent offered to pay petitioner an allowance for transporting freight between said loading or unloading points and petitioner's tracks and subsequently, after a study of the cost of such service if performed by petitioner, respondent published its tariff providing for payment of $1.23 per loaded car allowance to petitioner. Petitioner, however, has never performed the service for which the allowance was published, but such service has at all times continued to be performed by respondent. Said tariff naming the allowance and describing the service which is covered thereby but which is now performed by respondent, is set forth in the next succeeding paragraph of this petition.

IX. At all times since August 15, 1929, the duly filed and published tariff of respondent The Pennsylvania Railroad Company has provided for payment of allowance by respondent to petitioner if the latter performed the transportation service of moving and placing cars at loading and unloading points in its plant, and said tariff provides as follows:

(13) "The Pennsylvania Railroad Company

"Local Freight Tariff

"Terminal allowances to Weirton Steel Company at Weirton, W. Va., on traffic to and from points on or reached via the Pennsylvania Railroad Company

"On all carload revenue shipments, also on cars containing 10,000 pounds or more of less-carload revenue freight, destined to or coming from the plant of the Weirton Steel Company, the latter company performs the terminal switching service for account of The Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

"For such terminal service performed The Pennsylvania Railroad Company by the Weirton Steel Company, the latter will be al-
(14) lowed one dollar and twenty-three cents ($1.23) per loaded car, which will include the handling of the empty cars in the reverse direction.

"This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period February 6 to February 12, 1929, inclusive, and filed with the Interstate Commerce Commission.

"When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car, the maximum allowance for each additional car in the series or lot will be sixty-two cents ($.62), or fifty (50) per cent of the maximum for the first car.

"On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.—O. C. No. 49, P. S. C.—W. Va.—O. C. No. 49 (D. T Lawrence, Agent), supplements to or successive issues of said publication, the maximum allowance will be sixty-two cents ($.62), or fifty (50) per cent of the maximum allowed on the first car.

"The foregoing allowances will not be made on Ex-Lake Iron Ore, nor on traffic handled under local transportation charges as named in Pennsylvania Railroad Company Tariff 134-A, I. C. C. F-2025 (P. S. C.—W. Va. F-65) (Tariff File C-54), nor on shipments of Slag, Ashes or other refuse material for wasting, as named in Agent B. T. Jones' Tariff I. C. C. 1695 (W. Va. 90) (Penna. Tariff File
(15) C-105), supplements to or successive issues of said publication."

X. Respondent has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a tariff to become effective August 22, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner, as follows:

"Cancellation Notice

"The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East)

"Local Freight Tariff

"Terminal allowances to Weirton Steel Company at Weirton, W. Va., on traffic to and from points on or reached by The Pennsylvania Railroad Company is hereby cancelled

"Allowance Discontinued

"Issued in compliance with Fifteenth Supplemental Report and Order of the Interstate Commerce Commission in Ex Parte 104, Part 2, decided June 24, 1935.

(16) "Respondent has given to petitioner no reason for the aforesaid cancellation of Allowance except the issuance of said order of June 7, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent would not have filed the aforesaid tariff canceling said allowance were it not for the fear of incurring penalties for failure to comply with said order."

XI. The aforesaid order of the Commission instituting its investigation Ex Parte 104 on its own motion and without formal pleading, as set forth in paragraph IV of this petition, was not based upon any complaint or application of any sort submitted to the Commission by any person, either carrier or shipper, that the practice above described as in force at petitioner's plant was unreasonable, discriminatory, or in any way in violation of law, so far as known to petitioner. In the branch of said proceeding designated

Part II, Terminal Services of Class I Carriers, in which the testimony relative to petitioner's plant was taken, no party either carrier or shipper, presented any testimony purporting to show that said practice at petitioner's plant was unreasonable or discriminatory or otherwise in violation of law in any respect. Petitioner's representative appeared at said hearing in response to a request addressed to petitioner by the Secretary of the Commission, and said representative in response to the call of the presiding Director of Service of the Commission became a witness and presented testimony describing said practice. No other testimony as to said practice at petitioner's plant was presented except on behalf of respondent The Pennsylvania Railroad Company which
(17) respondent was a party to said proceeding of investigation solely by virtue of the Commission's order instituting such investigation and making all so-called Class I railroads of the United States respondents therein, and said respondent The Pennsylvania Railroad Company presented its testimony in support of the existing practice and tariffs.

XII. The said report and order of June 24, 1935, as above set forth, is unlawful and void in the following respects:

1. The Commission was without authority to make the said order.

2. The Commission failed to make requisite findings sufficient to support its order.

3. The Commission's said report and order are arbitrary and in violation of previous rulings as to the duty of a common carrier by railroad to perform the service of placement of empty cars for load at, and removal of loaded cars from, point of loading, and placement of loaded car at, and removal of empty car from, point of unloading, within the plant of the petitioner.

4. There was no evidence upon which the Commission could find—

(a) That the respondents have complied with their obligation to petitioner under their rates for interstate transportation to deliver and receive carload freight when they place the cars containing said freight on the so-called interchange tracks described of record or remove the cars therefrom;

(b) That the service of moving cars beyond the so-called interchange tracks is a plant service;

(18) (c) That by the publication of an allowance to petitioner for service performed by it in moving cars containing interstate shipments beyond the interchange tracks, respondents provide the means by which petitioner enjoys a preferential service not accorded to shippers generally;

(d) That to refund or remit a portion of the rates and charges collected or received as compensation for the transportation of property, as set forth in said supplemental report, is in violation of paragraph (7) of Section 6 of the Act.

5. The evidence on which the order is based shows conclusively that the terminal allowance published by the respondent railroad

company as payable to petitioner is for a transportation service embraced within the service for which the respondent railroad company publishes, charges, and receives the rates named in its tariffs of freight charges filed with the Interstate Commerce Commission; that the said terminal allowance is no more than just and reasonable and, being published in the tariffs of the respondent railroad company, is just as binding upon the respondent railroad company as is any rate named in its tariffs to be collected for the transportation of property by it in interstate commerce; and when the extent of the service of the carrier in the receipt and delivery of freight to be performed for the line haul rate is made clear by the published tariffs of the carrier and by the course of business followed by the carrier as recited above, and when it is stated in a tariff of the carrier that an allowance is made to the shipper or
(19) receiver of the freight for the performance of a part of said service, and the amount of such allowance is stated, such tariff being duly published and established and in force, such service and such allowance can not be in violation of Section 6 of the Interstate Commerce Act.

6. The evidence wholly fails to show any violation of law by the petitioner or by the respondent railroad company in connection with the terminal service performed by respondent at petitioner's plant as above described.

7. The report and order were not entered after full hearing and due investigation; and petitioner was not accorded due notice and full hearing as required by the statute.

XIII. Further, petitioner shows that prior to 1905 the question had arisen as to the Commission's power over allowances to shippers for services performed and facilities furnished by them for carriers subject to the Interstate Commerce Act. In its annual report to the Congress in 1905 the Commission said:

"Terminal roads, elevator charges, and private cars.

"There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen to any case where the shipper is the owner of any of the facilities of transportation or performs any part of the
(20) transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time

so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the commission should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

(21) Thereupon on June 29, 1906, 34 Statute 584; Section 1 of the Interstate Commerce Act was amended so that the term "railroad" should include—

"all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

The section was further amended so that the term "transportation" includes—

"All services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, icing, storing and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor."

Section 6 was amended so as to require the schedules of rates filed by carriers to "state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed." Section 6 was further amended by the addition of the following to Paragraph (7):

(22) "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15 was amended by the addition of the following paragraph:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint, or on its own initia-

tive, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

The Commission has no power to prohibit respondent railroad company from employing petitioner to furnish services or from using petitioner's facilities in the transportation of petitioner's property. The Commission has power only to determine whether the amount of the allowance published by respondent railroad company for petitioner's service and facilities is more than is just and reasonable for such services rendered and facilities furnished, and to fix a limit which shall not be exceeded in the payment
(23) therefor. The Commission in its said order of June 24, 1935, forbidding any and all allowance to petitioner for services rendered and facilities furnished, exceeded its authority and acted arbitrarily; therefore, the said order is void and of no effect.

XIV. Petitioner receives daily many carloads of inbound raw materials and supplies essential to its manufacturing operations. All said cars are moved over private sidings extending from the tracks of respondent carrier to the locations in petitioner's plant where said raw materials must be delivered and unloaded in order to be available for use in said manufacturing operations. Said materials are not thus available while in cars standing on tracks of respondent. Petitioner does not own the necessary locomotives or other means to move said cars from said respondent's tracks to unloading points in petitioner's plant. Respondent carrier has no public team tracks or other facilities at Weirton, West Virginia, sufficient or suitable for placement of cars for unloading the materials necessary to be used in petitioner's business of manufacturing.

Petitioner forwards daily many carloads of finished products from the various units comprising its said plant. Empty cars for loading with such products are placed alongside loading platforms or storage yards from which the goods to be shipped can be loaded into cars, which are then hauled over the sidings above-mentioned to the tracks of respondent carrier. Petitioner is not equipped with necessary motive power to perform said service. The respondent carrier has no suitable or sufficient team tracks or other facilities at Weirton, West Virginia, to handle said outbound freight if it is not handled in the manner above-described.

(24) Petitioner is under the practical necessity that all its rail transportation of inbound and outbound freight must be handled by respondent carrier. Said transportation includes movement over petitioner's industrial sidings that connect with the tracks of respondent carrier. The publication of a separate charge therefor, additional to the rates to and from Weirton, would result in petitioner's paying such charge or else suffering serious interruption

and curtailment or even discontinuance of its manufacturing operation.

In event petitioner should in the future provide locomotives to perform said terminal service itself, cancellation of the above-described terminal allowance tariff would prevent payment by the respondent to petitioner for the performance of said terminal service of transportation.

Unless the said order of the Commission be set aside, and the respondent carrier be required to perform said terminal service without charge in addition to the presently published rates or else withdraw its tariff canceling allowance to petitioner for its performance of said service, petitioner will be compelled either to pay twice for service performed by the carrier or to perform said terminal service for the benefit of respondent railroad company but at petitioner's own cost and expense, thereby subjecting petitioner to irreparable loss and injury.

In consideration whereof and inasmuch as your petitioner has no adequate remedy at law, and may have relief only in a Court of Equity, petitioner prays that this petition be received and filed;
that writs of subpoena be issued by the Clerk of the Court, as
(25) provided by law, commanding the United States of America and the Pennsylvania Railroad Company to appear and defend this action; that notice hereof be given to the Attorney General of the United States and to the Interstate Commerce Commission; that upon the filing of this bill the Judge of this Court call to his assistance two other Judges, one of whom shall be a Circuit Judge, and that upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to said respondent carrier, the petitioner be granted an interlocutory injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order which requires respondent carrier to cease and desist on or before August 22, 1935, and thereafter to abstain from the practice in said order described; and that upon final hearing of this case, a decree be entered adjudging the said order to be in all respects null and void and permanently enjoining, annulling, and setting aside the enforcement, operation, and execution of said order.

And petitioner further prays that a preliminary or interlocutory order or injunction be entered, requiring the railroad respondent to cancel the tariff herein referred to, filed in alleged conformity with the said order of the Commission, and suspending the cancellation of the terminal allowance provided by the tariff now published, until final determination of this cause, and that upon the final hearing
herein, a decree be entered perpetually enjoining, suspending,
(26) annulling, and setting aside the said canelling tariff and requiring the said respondent to file new tariffs restoring the terminal allowance in effect on June 23, 1935, on interstate traffic handled by the petitioner at its said plant at Weirton, West Virginia,

unless and until changed by agreement of the parties or by a lawful decision of the Interstate Commerce Commission.

Petitioner further prays, inasmuch as the purpose of the foregoing prayers for relief is to set aside the order of the Commission of June 24, 1935, and to restore the *status quo* of June 23, 1935, for such other and further orders or decrees as may be necessary to set aside said order of the Interstate Commerce Commission and to require the railroad respondents to vacate, annul, and set aside any and all action which may have been taken under and by reason of said order of the Commission, and to take such action as may be necessary to restore the parties and properties affected by said order to the status of June 23, 1935, and for such further and other relief in the premises as the nature of the case shall require, and to this court shall seem meet.

JOHN S. BURCHMORE,
WILLIAM W. COLLIN, JR.,
Solicitors for Petitioner.

WALTER, BURCHMORE & BELNAP,
1622 First National Bank Bldg., Chicago, Ill.
PATTERSON, GOEHRING, MCCLINTOCK & COLLIN,
928 Frick Bldg., Pittsburgh, Pa.

(27) *Duly sworn to by W. F. Morris, Jr., jurat omitted in printing.*

(28–104) [Appendix A to petition omitted. Printed side page, 20 ante.]

(105) *Appendix B to petition*

Interstate Commerce Commission

Weirton Steel Company, Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Submitted October 17, 1934. Decided June 24, 1935

Payment to the industry for switching service, beyond the present points of interchange, or performance of such service by respondent without a reasonable charge therefor, found unlawful.

Same appearances as in the original report.

Fifteenth Supplemental Report of the Commission

Division 6, Commissioners McManamy, Lee, and Miller

By Division 6:

In the original report in this proceeding, Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, certain principles were announced concerning the payment of allowances for spot-

ting service at the plants of individual industries heard
(106) on this record, or the performance of such service by respondents in lieu thereof. This report deals with the propriety and lawfulness of the performance of spotting service by The Pennsylvania Railroad Company, hereinafter termed the Pennsylvania, at the plant of the Weirton Steel Company, hereinafter termed the industry.

This industry is engaged in the manufacture of tin plate, sheet iron, strip steel, slabs, billets, sheet bars, and coke by-products at Weirton, West Virginia. Its plant was established in 1909 and now extends from East Weirton to Weirton Junction, a distance of 1.63 miles. The Pennsylvania bisects the plant and crosses a state highway about midway of the plant. The first unit of the plant constructed was a tin mill located south of the Pennsylvania, and which was served by a simple track layout of several short spurs. Additional units were added from time to time until the plant is now composed of seven major departments, namely, coke plant, tin mill, steel works, 10 inch and 16 inch strip mill, 48 inch strip mill, sheet mill, scrap yard, and numerous minor units, each having its own industrial track layout and one or more rail connections with the Pennsylvania. There are approximately 25 miles of track within the plant enclosure. The industry owns five large switching locomotives and four small 4-wheel locomotives used for the purpose of performing intraplant service. The small locomotives seldom go upon the tracks used in interchange service, but are used principally in departmental activities in transporting ladles, pan cars,
(107) etc., within a single building or between adjacent buildings.

The steel works is the largest of the seven major units. It is located northeast of the right of way of the Pennsylvania, and while the mileage of its industrial track layout is not described of record, it is quite extensive, and serves numerous loading and unloading points for the different operations. There are approximately twelve parallel tracks located between the right of way of the Pennsylvania and this plant unit. Two of these tracks are ordinarily used as interchange points for cars moved to and from the steel works, and the remainder for the storage of private cars owned by the industry.

Inbound cars containing scrap and numerous other commodities after placement on the interchange tracks by the Pennsylvania are moved by plant power to the scales, a distance of a few hundred feet, and after weighing are returned to the interchange tracks from which they are subsequently moved to the points of unloading by the Pennsylvania locomotive assigned to this plant and which works 24 hours a day and seven days a week, under the supervision of a plant yardmaster or foreman. Similarly, outbound shipments are moved to the interchange tracks by the Pennsylvania locomotive assigned to the plant and there picked up by another locomotive for movement to the Pennsylvania yard for classification. Witness for the industry frankly admitted that the movement to and from the scales with plant power was to avoid the payment of the charge

(108) that would be made if such service were performed by the Pennsylvania. Cars are ordered spotted in accordance with the needs of the various departments comprising this unit, and a witness for the industry testified that it would not meet the needs of the industry to have the spotting performed by the Pennsylvania on a regular schedule, because the different departments operate continuously for twenty-four hours a day, seven days a week, and cannot be subject to interruption in their operating program such as would occur if the spotting were performed with clock-like regularity on a fixed schedule. It is necessary, therefore, in order to meet the industrial requirements that the Pennsylvania assign a locomotive to the steel plant, and not because of the volume of traffic or for railroad convenience. Respondent is under no legal obligation to spot cars for complainant solely at the latter's convenience.

Pittsburgh Forge & Iron Co. v. Director General, 59 I. C. C. 29, 32.

The coke plant and tin mill are adjacent to each other and are located between the right of way of the Pennsylvania and the Ohio River at the southwest corner of the industry's property. The coke plant is also provided with docks for receiving shipments by water. Other units are located north of the right of way of the Pennsylvania and some south thereof. The Pennsylvania engine that delivers cars on the interchange tracks at the steel works, also performs the spotting service at the other units, except the strip mill. This engine operates 24 hours daily, and spends from 7 to 8 hours switching
(109) the other units including service twice daily at the coke plant and three times at the tin and sheet mills, in addition to switching for various other concerns, public team tracks and the freight house in the Weirton district. One engine performs the spotting service 16 hours a day at the strip mill, and likewise performs at the established tariff rate whatever intraplant service is necessary.

The longest move from point of connection with the right of way of the Pennsylvania to point of unloading and loading within the plant is 5,200 feet to the open hearth stock house in the steel works, and the shortest distance is 400 feet to the scrap yard. The mean distance is said to be 2,300 feet and the length of industrial tracks over which Pennsylvania locomotives operate is stated to be between four and five miles. Except at the steel works, the spotting service is performed by the switching crews which move the cars from the Pennsylvania yard to the industrial plant, and substantially the same work is performed each day at the various plant units. By contact with the classification yard of the Pennsylvania the steel company ascertains what inbound shipments have arrived and a switching list, detailing the points at which specific loads are to be spotted and indicating the cars to be removed, is given to the switching crew upon reaching each plant unit.

In 1921 the Pennsylvania offered to pay an allowance of 84 cents per loaded car to the industry to perform the spotting service, but this amount was not satisfactory to the industry, and for that
(110) reason was not published. Between 1921 and 1929, this in-

dustry expanded very rapidly, and because of the constant building and construction work a cost study could not well have been conducted. However, a 10-day cost study was made starting on January 15, 1929, and on August 15, 1929, an allowance of $1.23 was published in tariff form, but was not accepted, and the Pennsylvania continued to perform the spotting service. The principal reason for refusing the allowance was that the industry had insufficient power to perform both the interchange and intraplant service. If the industry had undertaken to perform the spotting service in addition to the intraplant work, it would have been necessary to purchase at least three large locomotives and supply additional tracks which it was not willing to do.

Inbound shipments of iron ore, coal, and limestone are not weighed except in instances when there is reason to suspect there has been an appreciable loss in transit. Inbound shipments of sulphuric acid in tank cars are all weighed. But the work is incidental to the switching since the scales are so located as not to entail any additional car movements. This service is performed by the Pennsylvania power; in fact, all necessary switching occasioned by the weighing of inbound commodities is performed by the Pennsylvania power except deliveries to the steel works. Any reweighing performed by the railroad is paid for in accordance with the tariff.

(111) All outbound finished material, except commercial coke, is shipped at invoice weights under agreement with the Trunk Line Weighing and Inspection Bureau. Coke is weighed on industry scales so that it may be invoiced more promptly than when weighed in transit on Pennsylvania scales. No outbound shipments are weighed at the tin mill or the structural mill department of the steel works. Outbound shipments from the strip steel department are check weighed on industry scales for the purpose of detecting errors, but bills of lading carry invoice weights.

It is clear that the nature of this industry requires that the switching service performed within its plant be under its exclusive direction and control, and such switching is in excess of team-track or simple-switch placement, and beyond the scope of the carrier's legal obligation under its line-haul rates. Gulf States Steel Co. v. Director General, 66 I. C. C. 255, citing Standard Oil Co. v. Director General, 59 I. C. C. 620.

We find that the switching service performed beyond the interchange tracks described of record is a plant service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates; that the performance of said service by respondent without reasonable charge therefor, or the payment of an allowance for the service if performed by the industry results in the industry's receiving a preferential service not accorded to shippers generally; and that by the payment of said allowance the respondent carrier refunds or remits a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of section 6 (7) of the act.

An appropriate order will be entered.

(112) ORDER

At a Session of the Interstate Commerce Commission, Division 6, held at its office in Washington, D. C., on the 24th day of June A. D. 1935.

Weirton Steel Company Terminal Allowance Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the performance of spotting service within the plant of the Weirton Steel Company at Weirton, W. Va., by The Pennsylvania Railroad Company, and the Commission having under date of May 14, 1935, made and filed a report in Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions with respect to spotting services at the Weirton plant, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the performance of spotting service for the Weirton Steel Company at its plant at Weirton, W. Va., or the payment of an allowance to the industry for performing this service, The Pennsylvania
(113) Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That The Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 22, 1935, and thereafter to abstain from such unlawful practices.

By the Commission, Division 6.

[SEAL] GEORGE B. McGINTY,
Secretary.

108 [File endorsement omitted.]

(1) In United States District Court—For the Western District of Pennsylvania

No. 3130 in Equity

WEST LEECHBURG STEEL COMPANY

v.

UNITED STATES OF AMERICA

THE PENNSYLVANIA RAILROAD COMPANY

Petition

Filed Aug. 31, 1935

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania:

Your petitioner, West Leechburg Steel Company, a corporation, presents this its petition against United States of America and the Pennsylvania Railroad Company; and thereupon petitioner respectfully states:

I. Petitioner is a corporation duly organized and existing under the laws of the State of Pennsylvania, with principal office at Pittsburgh, Pennsylvania, in the Western District of Pennsylvania, and owning and operating a plant at Leechburg, Pennsylvania, where it is now and for many years past has been engaged in the
(2) manufacture of steel products; and in the conduct of said business it receives at its plant large quantities of ore, coal, limestone, and other raw materials and other commodities, and ships large quantities of manufactured steel products from said plant.

II. Respondent The Pennsylvania Railroad Company (hereinafter at times referred to as carrier respondent or railroad respondent) is a common carrier of property by railroad between Leechburg, Pennsylvania, and points in other states, and as such common carrier is subject to the Interstate Commerce Act; and said carrier respondent owns and operates lines of railroad within Pennsylvania and in other states, and transports freight in interstate commerce for delivery to petitioner's plant at Leechburg, Pennsylvania, and from said plant to destinations in other states.

III. Petitioner brings this suit in equity against the United States of America pursuant to an Act of Congress approved October 22, 1913, as statutes at large 219 (28 U. S. C. A. Sec. 41, subsections 45, 46, 47), and under the general equity jurisdiction of this Court, to enjoin, set aside, and annul a certain report and order entered by the Interstate Commerce Commission on July 29, 1935, in a proceeding known as Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, said report and order being sub-titled Thirty-fifth Supplemental Report of the Commission, West Leechburg Steel Company Terminal Allowance; and to enjoin and restrain the respondent carrier from com-
(3) plying with the aforesaid order of the Commission entered July 29, 1935.

IV. The said Commission, on its own motion, entered an order under date of July 6, 1931, without any complaint having been made to or petition filed with said Commission, according to petitioner's information and belief, which said order was in words and figures as follows:

"ORDER

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July, A. D. 1931.

"Ex Parte No. 104

"Practices of Carriers Affecting Operating Revenues or Expenses

"Sections 12 and 15 (a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act which affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

It is ordered, That the commission, on its own motion and without formal pleading, enter upon a proceeding of inquiry and
(4) investigation into and concerning practices of carriers by railroad subject to the interstate commerce act which affect operating revenues or expenses;

"It is further ordered, That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

"And it is further ordered, That this proceeding be assigned for hearing at such times and places and with respect to such practices as the commission may hereafter direct.

"By the Commission.

[SEAL] "GEORGE B. MCGINTY,
"*Secretary.*"

Petitioner presumes that aforesaid order was served upon all so-called class I carriers by railroad subject to the Act, and therefore avers that said order was served upon each of the carrier respondents.

Subsequently, the Commission issued its notice under date of August 13, 1931, entitled: "Ex Parte No. 104, Part II, Terminal Services of Class I Carriers. Notice of Information to be sought at hearings." In said notice the Commission ostensibly defined "in scope and restriction" said Part II of the aforesaid general inquiry as intended to establish facts concerning various services, charges, and practices of carriers subject to the Act, including, among others, terminal services and practices in the receipt and delivery of carload freight, including the spotting of cars, and all services and
(5) privileges, except transit and lighterage, incident to said terminal services within the meaning of Section 6 of the Interstate Commerce Act, which affect the measure of the transportation service performed at the line-haul rates and the value of such services to the consignors and consignees; the extent to which the line-haul rates include charges for such services; allowances and absorptions made out of the line-haul rates; and the extent to which such services reach beyond the carriers' terminals to particular locations on private tracks, sidings, industrial plant tracks, and on the rails of industrial common carriers.

The Commission conducted extended hearings in said proceeding at numerous places, at various times from September 15, 1931, to

November 21, 1932; thereafter a "proposed report" was prepared by the Commission's Director of Service, W. P. Bartel, before whom the hearings had been held; exceptions were filed by numerous parties; and oral argument before the Commission was had. Thereafter the Commission issued its report, dated May 14, 1935, without order, which report has subsequently been described by the Commission as its original report in which it reviewed the subject matter of the inquiry generally and set forth its legal conclusions.

A copy of said original report of the Commission, marked Appendix A, and a copy of said thirty-fifth supplemental report, marked Appendix B, are attached hereto and are made a part hereof as fully as though set forth at length herein.

(6) On or about August 15, 1935, petitioner filed with the Commission its petition for vacation of said order of July 29, 1935, upon various errors of fact and law alleged therein. Petitioner is not advised of any action thereon by the Commission.

V. The uniform custom and practice of all common carriers, in the State of Pennsylvania and in other states throughout the Union, including the carrier named as respondent in this bill, is to state in their rate tariffs published and filed with the Commission, the city, town, or other station locality to and from which they undertake to transport freight at the rates and charges in such tariffs stated, without stating the precise spot in such city, town, or station locality at which they undertake to receive or deliver such freight. Under such tariffs it is and for many years has been the uniform custom and practice to include within the carload freight rates established and maintained for the transportation of carload freight the complete service comprehended in (a) the providing and furnishing of a suitable car for transportation and the placement of the car at any point reasonably accessible and convenient for loading on standard gauge tracks serving any and all industrial plants; and after the freight has been loaded in said cars by consignor, to remove the same and transport the goods therein to destination; and (b) to deliver the carload freight by placing the car, wherein such freight is transported, at any point reasonably convenient for the unloading and removal of the freight from the car on the standard gauge tracks serving any and all industrial plants and to remove the empty cars there-

(7) from after the freight has been received and unloaded by the consignee. It is customary for railroads for various reasons sometimes to employ other railroad companies to complete their undertaking to spot the cars as aforesaid, and to pay such other railroads for such service, and sometimes to employ the shipper or receiver of freight to complete said undertaking to spot the cars as aforesaid and in such cases to compensate by payments termed allowances to such shippers and receivers of freight for such service. Respondent carrier has followed such customs generally in serving shippers and receivers of freight over its lines of road.

Pursuant to such custom, the carrier respondent herein has provided in its tariffs that, for the compensation afforded by its established rates for transportation between designated cities, towns, or other station localities, it would deliver and receive carload freight by the placement of the cars at any reasonable and convenient point for the loading or unloading thereof on the tracks serving the said plant of petitioner at Leechburg, Pennsylvania, the same as at all plants, industries, and business establishments adjacent to its railroad and served by so-called private or industrial sidings.

The duly filed and published tariffs of respondent carrier and all other carriers in the State of Pennsylvania and in other states of the United States, as in effect now and for more than twenty years past, name rates for transportation covering the complete services described in this paragraph, with respect to carload freight moving to and from any and all railroad terminals and industries, plants, warehouses, or other business establishments; and the same rates have been applicable and have been applied by all of said carriers, whether carload shipments of freight originated on so-called public team tracks or on so-called private side tracks serving the plants, industries, and other business establishments and whether such shipments were delivered on so-called public team tracks or on so-called private side tracks as aforesaid.

(8)

VI. The record in the aforesaid investigation by the Commission in Ex Parte 104, Part II, containing abundant testimony by numerous witnesses supporting the averments in paragraph V hereof; and there is no evidence in said record to the contrary.

There is no evidence in said record that the carriers in serving any industry, plant, warehouse, or other business establishment have sought to limit their duty or terminate their obligation under the line-haul rates by placement of cars at any point short of or intermediate to the place mutually agreed upon with the shipper or consignee as reasonable and convenient for the loading or unloading of carload freight.

VII. Section 1 of the Interstate Commerce Act, U. S. Code, title 49, Sec. 1, 41 Stat. L. 474, provides:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, * * *.

(9) "(2) The provisions of this Act shall also apply to such transportation of passengers and property * * * but only in so far as such transportation * * * takes place within the United States, * * *.

"(3) The term 'common carrier' as used in this Act shall include * * * all persons, natural or artificial, engaged in such transportation * * * as aforesaid as common carriers for hire. * * * The term 'railroad' as used in this Act shall include all * * * the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement,

or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *

"(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of * * * property to
(10) provide and furnish such transportation upon reasonable request therefor, * * *."

Section 6 provides:

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property * * * will be carried, * * * and shall also state separately all terminal charges, * * * and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the * * * shipper, or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. * * *

"(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of * * * property, as defined in this Act, unless the rates, * * *
(11) and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates, * * * and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, * * * and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15, paragraph 13, provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as
(12) the orders above provided for under this section."

VIII. Petitioner West Leechburg Steel Company for several years past has rendered the transportation service and furnished the instrumentalities employed in moving with its own locomotives carloads of freight between the rails of the railroad respondent herein and convenient points for unloading or loading said freight at points on petitioner's tracks in said plant. The lines of said respondent are adjacent to petitioner's plant, and have switch connections with petitioner's private sidings.

For said terminal switching service petitioner has, in accordance with tariffs duly filed and published, received from respondent carrier payment at the rate of $1.28 per loaded car since November 25, 1927. Said allowance was published by the carrier respondent herein after investigations of petitioner's cost of performing said terminal switching service.

IX. At all times since November 25, 1927, the duly filed and published tariff of the railroad respondent has provided for payment of allowance by said respondent to petitioner for performance of the transportation service of moving and placing cars at loading and unloading points in petitioner's plant.

X. Respondent carrier has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania tariff to become effective September 16, 1935, providing
(13) for the cancellation of the aforesaid tariff naming allowance to petitioner.

Respondent carriers have given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of September 12, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent carriers would not have filed the aforesaid tariffs cancelling said allowance were it not for the fear of incurring penalties for failure to comply with said order.

XI. The aforesaid order of the Commission instituting its investigation Ex Parte 104 on its own motion and without formal pleading, as set forth in paragraph IV of this petition, was not based upon any complaint or application of any sort submitted to the Commission by any person, either carrier or shipper, that the practice above described as in force at petitioner's plant was unreason-

able, discriminatory, or in any way in violation of law, so far as known to petitioner. In the branch of said proceeding designated Part II, Terminal Services of Class I Carriers, in which the testimony relative to petitioner's plant was taken, no party, either carrier or shipper, presented any testimony purporting to show that said practice at petitioner's plant was unreasonable or discriminatory or otherwise in violation of law in any respect. Petitioner's representative appeared at said hearing in response to a request addressed to petitioner by the Secretary of the Commission, and said
(14) representative in response to the call of the presiding Director of Service of the Commission became a witness and presented testimony describing said practice. No other testimony as to said practice at petitioner's plant was presented except on behalf of respondent carriers herein which respondents were party to said proceeding of investigation solely by virtue of the Commission's order instituting such investigation and making all so-called Class I railroads of the United States respondents therein, and said respondents herein presented their testimony in support of the existing practice and tariffs.

XII. The said report and order of September 12, 1935, as above set forth, is unlawful and void in the following respects:

1. The Commission was without authority to make the said order.

2. The Commission failed to make requisite findings sufficient to support its order.

3. The Commission's said report and order are arbitrary and in violation of previous rulings as to the duty of a common carrier by railroad to perform the service of placement of empty cars for load at, and removal of loaded cars from, point of loading, and placement of loaded car at, and removal of empty car from, point of unloading, within the plant of the petitioner.

4. There was no evidence upon which the Commission could find—

(a) That the respondents have complied with their obligation to petitioner under their rates for interstate transportation to
(15) deliver and receive carload freight when they place the cars containing said freight on the so-called interchange tracks described of record or remove the cars therefrom;

(b) That the service of moving cars beyond the so-called interchange tracks is a plant service;

(c) That by the publication of an allowance to petitioner for service performed by it in moving cars containing interstate shipments beyond the interchange tracks, respondents provide the means by which petitioner enjoys a preferential service not accorded to shippers generally;

(d) That to refund or remit a portion of the rates and charges collected or received as compensation for the transportation of property, as set forth in said supplemental report, is in violation of paragraph (7) of Section 6 of the Act.

5. The evidence on which the order is based shows conclusively that the terminal allowance published by the respondent railroad company as payable to petitioner is for a transportation service embraced

within the service for which the respondent railroad company publishes charges and receives the rates named in its tariffs of freight charges filed with the Interstate Commerce Commission; that the said terminal allowance is no more than just and reasonable and, being published in the tariffs of the respondent railroad company, is just as binding upon the respondent railroad company as is any rate named in its tariffs to be collected for the transportation of property by it in interstate commerce; and when the extent of the service of (16) any carrier in the receipt and delivery of freight to be performed for the line haul rate is made clear by the published tariffs of the carrier and by the course of business followed by the carrier as recited above, and when it is stated in a tariff of the carrier that an allowance is made to the shipper or receiver of the freight for the performance of a part of said service, and the amount of such allowance is stated, such tariff being duly published and established and in force, such service and such allowance can not be in violation of Section 6 of the Interstate Commerce Act.

6. The evidence wholly fails to show any violation of law by the petitioner or by the respondent railroad in connection with the terminal service performed by petitioner at petitioner's plant as above described.

7. The report and order were not entered after full hearing and due investigation; and petitioner was not accorded due notice and full hearing as required by the statute.

XIII. Further, petitioner shows that prior to 1905 the question had arisen as to the Commission's power over allowances to shippers for services performed and facilities furnished by them for carriers subject to the Interstate Commerce Act. In its annual report to the Congress in 1905 the Commission said:

"Terminal roads, elevator charges, and private cars.

"There is an important class of cases in (17) which the owner of the property performs a part of the transportation service, where the carrier by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen to any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which

have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railways and without injury to the public, if provided by the shipper itself. (18) We do think, however, that the commission should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

Thereupon on June 29, 1906, 34 Stat. 584, Section 1 of the Interstate Commerce Act was amended so that the term "railroad" should include—

"all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

The section was further amended so that the term "transportation" includes—

"All services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, icing, storing, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such (19) transportation upon reasonable request therefor."

Section 6 was amended so as to require the schedules of rates filed by carriers to "state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed." Section 6 was further amended by the addition of the following to Paragraph (7):

"Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15 was amended by the addition of the following paragraph:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect

and be enforced in like manner as the orders above provided for under this section."

(20) The Commission has no power to prohibit respondent railroad company from employing petitioner to furnish services or from using petitioner's facilities in the transportation of petitioner's property. The Commission has power only to determine whether the amount of the allowance published by respondent railroad company for petitioner's service and facilities is more than is just and reasonable for such services rendered and facilities furnished, and to fix a limit which shall not be exceeded in the payment therefor.

The Commission in its said order of July 29, 1935, forbidding any and all allowance to petitioner for services rendered and facilities furnished, exceeded its authority and acted arbitrarily; therefore, the said order is void and of no effect.

XIV. Petitioner receives daily many carloads of inbound raw materials and supplies essential to its manufacturing operations. All said cars are moved over private sidings extending from the tracks of respondent carrier to the locations in petitioner's plant where said raw materials must be delivered and unloaded in order to be available for use in said manufacturing operations. Said materials are not thus available while in cars standing on tracks of respondent carrier or on the so-called interchange tracks. Respondent carrier has no public team tracks or other facilities at Leechburg, Pennsylvania, sufficient or suitable for placement of cars for unloading the materials necessary to be used in petitioner's business of manufacturing.

(21) Petitioner forwards daily many carloads of finished products from its said plant. Empty cars for loading with such products are placed alongside loading platforms or storage yards from which the goods to be shipped can be loaded into cars, which are then hauled by petitioner over the sidings above-mentioned to the tracks of respondent carrier. The respondent carrier has no suitable or sufficient team tracks or other facilities at Leechburg, Pennsylvania, to handle said outbound freight if it is not handled in the manner above-described.

Petitioner is under the practical necessity that all its rail transportation of inbound and outbound freight must include movement over petitioner's industrial sidings that connect with the tracks of respondent carrier.

Unless the said order of the Commission be set aside, and the respondent carrier be required to withdraw its tariffs canceling allowance to petitioner for its performance of said service, petitioner will be compelled either to pay twice for service performed by the carrier or to perform said terminal service for the benefit of respondent railroad company but at petitioner's own cost and expense, thereby subjecting petitioner to irreparable loss and injury.

In consideration whereof and inasmuch as your petitioner has no adequate remedy at law, and may have relief only in a Court of Equity, petitioner prays that this petition be received and filed; that writs of subpoena be issued by the Clerk of the Court, as provided by law, commanding the United States of America and the Pennsylvania Railroad Company to appear and defend this action
(22) that notice hereof be given to the Attorney General of the United States and to the Interstate Commerce Commission; that upon the filing of this bill the Judge of this Court call to his assistance two other Judges, one of whom shall be a Circuit Judge, and that upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to said respondent carrier, the petitioner be granted an interlocutory injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order of July 29, 1935, in Ex Parte 104, Part II, Terminal Services, which requires respondent carrier to cease and desist on or before September 16, 1935, and thereafter to abstain from the practice in said order described; and that upon final hearing of this case, a decree be entered adjudging the said order to be in all respects null and void and permanently enjoining, annulling and setting aside the enforcement, operation and execution of said order.

And petitioner further prays that a preliminary or interlocutory order or injunction be entered, requiring the railroad respondent to cancel the tariff herein referred to, filed in alleged conformity with the said order of the Commission, and suspending the cancellation of the terminal allowance provided by the tariff now published, until final determination of this cause, and that upon the final hearing herein, a decree be entered perpetually enjoining, suspending,
annulling and setting aside the said cancelling tariff and re-
(23) quiring the said respondent to file new tariffs restoring the terminal allowance in effect on July 28, 1935, on interstate traffic handled by the petitioner at its said plant at Leechburg, Pennsylvania, unless and until changed by agreement of the parties or by a lawful decision of the Interstate Commerce Commission.

Petitioner further prays, inasmuch as the purpose of the foregoing prayers for relief is to set aside the order of the Commission of July 29, 1935, and to restore the *status quo* of July 28, 1935, for such other and further orders or degrees as may be necessary to set aside said order of the Interstate Commerce Commission and to require the railroad respondent to vacate, annul and set aside any and all action which may have been taken under and by reason of said order of the Commission, and to take such action as may be necessary to restore the parties and properties affected by said order to the status of July 28, 1935.

And petitioner prays for such further and other relief as the nature of the case shall require, and to this court shall seem meet.

John S. Burchmore
JOHN S. BURCHMORE,
William W. Collin, Jr.,
WILLIAM W. COLLIN, JR.
Solicitors for Petitioner.

WALTER, BURCHMORE & BELNAP,
1522 First National Bank Bldg., Chicago, Ill.

PATTERSON, GOEHRING, MCCLINTOCK & COLLIN,
928 Frick Bldg., Pittsburgh, Pa.

(24) [*Duly sworn to by M. W. Leech; jurat omitted in printing.*]

(25–101) [Appendix A to petition omitted. Printed side page, 20 ante.]

(102) *Appendix B to petition*

Interstate Commerce Commission

West Leechburg Steel Company Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Submitted October 17, 1934. Decided July 29, 1935

Carrier's compensation under its line-haul rate found not to include service for which allowance is paid. Payment, therefore, found to be unlawful.

Same appearances as in original report.

Thirty-fifth Supplemental Report of the Commission

Division 6, Commissioners McManamy, Porter, and Miller

By Division 6:

In the original report in this proceeding, Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, certain principles were announced concerning the payment of allowances to
(103) industries for performing spotting service at their industrial plants, or the performance of such service by respondents in lieu of payment. This supplemental report pertains to an allowance paid by the Pennsylvania Railroad Company, hereinafter referred

to as the Pennsylvania, to the West Leechburg Steel Company for movements of cars by the latter company within its plant at Leechburg, Pa.

The Leechburg Company produces cold-rolled strip and skelp steel from semi-finished materials purchased from other steel plants. The plant contains 17 industrial tracks, aggregating about 4½ miles in length, which serve 8 important points where freight cars are spotted for loading and unloading.

The plant is bounded on the south by the main line of the Pennsylvania, and on the north by the Kiskiminetas River. The average volume of railroad traffic interchanged is approximately 11,000 cars annually. In the year 1929, for example, 4,845 cars were received and 6,363 were shipped outbound. Cars are interchanged on two tracks located on the respondent's right-of-way adjacent to, and about midway of the steel company's south property line.

At the time of this hearing the steel company was operating only every other week, one eight-hour shift daily. It performed all of the service of moving cars beyond the interchange tracks above described, and that service and the intraplant service required the use of one locomotive. A locomotive crane was also used in the performance of intraplant service. In normal times, however,
(104) the locomotive is employed over a 24-hour operating period daily. About 40 percent of the locomotive time is required in the movement of cars to and from interchange tracks and the remainder in intraplant service. For the former service respondent allows the steel company $1.28 per loaded car. This figure is based on costs in 1916, and was established as of November 25, 1927.

The record does not disclose when this plant began operations, but apparently it has always performed the spotting service. On March 25, 1925, the steel company requested the Pennsylvania to either grant an allowance or perform the spotting, so as to place this plant on an equality with its competitors. On May 8 of the same year, the Pennsylvania notified the steel company that it preferred to perform the switching rather than pay an allowance, but upon examination of the industrial tracks, it was found that some curvatures and turnouts in the tracks would not permit operation thereover by respondent's locomotives. The conditions complained of were corrected by the steel company, and on March 7, 1927, the Pennsylvania began performing the spotting and continued to do so until the allowance became effective.

The plant ordinarily operates on a 24-hour basis and its needs cover that period. Two switches were furnished daily by the crew of a local train, which arrived at the plant at certain agreed times, and spent a definite period performing all switching while there.
This service was performed under the direction of the steel
(105) company's yardmaster and required from one to one and one-half hours morning and evening.

The spotting services furnished by the Pennsylvania did not meet the industry's requirements because there were frequent occa-

sions when certain materials were ordered from other steel plants, for immediate use, to be delivered by through trains with power too heavy to spot these loads. The service was also unsatisfactory to the Pennsylvania as at times it was necessary to furnish a locomotive from Kiskiminetas Junction four miles distant, to supplement the switching service performed by the local train crew. It was for these reasons that the Pennsylvania decided to pay the allowance. It is conclusive, therefore, that the spotting at this plant has to be performed at the convenience of the industry, and if performed by the Pennsylvania, would require constant or standby service. Carriers are under no obligation to perform service beyond the agreed points of interchange solely at the convenience of an industry. Merchant Shipbuilding Corp. v. Pennsylvania R. Co., 61 I. C. C. 214, 217; Car Spotting Charges, 34 I. C. C. 609, 617.

The industrial operations require that all inbound loads be weighed on industrial scales, located at the extreme west end of the plant, contiguous to the south property line. The weighing service is performed after the cars have been delivered on the interchange tracks and is solely for the benefit and convenience of the steel company. The outbound loads are not weighed. In making the cost study the time for weighing was deducted from the
(106) time consumed in spotting. Under the rules for determination of allowances to plant facilities (see Propriety of Operating Practices—Terminal Services, supra, Appendix A), the carrier's duty with respect to delivery terminates at the point of interruption or interference in this case, the scales. In other words, the respondent is prevented from performing the spotting service within this plant in an uninterrupted movement at its ordinary operating convenience, and has, therefore, fulfilled its common-carrier obligation, under its line-haul rates, by the delivery and receipt of cars on reasonably convenient interchange tracks.

We find that the existing line-haul rates of the Pennsylvania must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; that the transportation services which it is the duty of the Pennsylvania to perform for the steel company begin and end at the interchange tracks; and that the movements by the steel company between the interchange tracks and points within its plant are plant services which it is not the duty of the Pennsylvania to perform.

We further find that by the payment of an allowance for the service performed on interstate shipments beyond the interchange tracks described of record, the respondent carrier provides the means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for the trans-
(107) portation of property, in violation of section 6 (7) of the act.

An appropriate order will be entered.

ORDER

At a Session of the Interstate Commerce Commission, Division 6, held at its office in Washington, D. C., on the 29th day of July, A. D., 1935.

West Leechburg Steel Company Terminal Allowance

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The Pennsylvania Railroad Company to the West Leechburg Steel Company for performance by the latter of spotting service within its plant at Leechburg, Pa., and the Commission having under date of May 14, 1935, made and filed a report in Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions (108) with respect to the allowance paid to the West Leechburg Steel Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance The Pennsylvania Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That The Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before September 16, 1935, and thereafter to abstain from such unlawful practice.

By the Commission, Division 6.

[SEAL] GEORGE B. MCGINTY,
Secretary.

109 [File endorsement omitted.]

(1) In United States District Court for the Western District of Pennsylvania

No. 3136 in Equity

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA
MISSOURI PACIFIC RAILROAD COMPANY
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Petition

Filed Oct. 8, 1935

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania:

Your petitioner, Pittsburgh Plate Glass Company, a corporation, presents this its petition against United States of America and Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company; and thereupon petitioner respectfully states:

I. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, with principal

(2) operating office at Pittsburgh in said Commonwealth and in the Western District of Pennsylvania, and owning and operating a plant at Crystal City, Missouri, where it is now and for many years past has been engaged in the manufacture of plate glass and other glass products; and in the conduct of said business it receives at its plant large quantities of sand, coal, limestone and other raw commodities and other materials, and ships large quantities of plate glass and related products from said plant.

II. Respondents Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company are common carriers of property by railroad between Crystal City, Missouri, and points in other states, and as such common carriers are subject to the Interstate Commerce Act, and own and operate lines of railroad within Missouri and in other States, and transport interstate freight for delivery to petitioner's plant at Crystal City, Missouri, and in like manner transport freight from said plant to destinations in other states.

III. Petitioner brings this suit in equity against the United States of America pursuant to an Act of Congress approved October 22, 1913, 38 statutes at large 219 (28 U. S. C. A. Sec. 41, subsections 45, 46, 47), and under the general equity jurisdiction of this Court, to enjoin, set aside and annul a certain report and order entered by the Interstate Commerce Commission on September 12, 1935, in a proceeding known as Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services,

(3) said report and order being subtitled Forty-third Supplemental Report of the Commission, Pittsburgh Plate Glass Company Terminal Allowance, Crystal City, Mo.; and to enjoin and restrain the respondent carriers from complying with the aforesaid order of the Commission entered September 12, 1935.

IV. The said Commission, on its own motion, entered an order under date of July 6, 1931, without any complaint having been made to or petition filed with said Commission, according to petitioner's information and belief, which said order was in words and figures as follows:

"ORDER

"At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July A. D. 1931

"Ex Parte No. 104

"Practices of Carriers Affecting Operating Revenues or Expenses

"Sections 12 and 15 (a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act which affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view
(4) to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

"It is ordered, That the commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and investigation into and concerning practices of carriers by railroad subject to the interstate commerce act which affect operating revenues or expenses;

"It is further ordered, That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

"And it is further ordered, That this proceeding be assigned for hearings." In said notice, the Commissin ostensibly defined "in as the commission may hereafter direct:

"By the Commission.

"[SEAL] GEORGE B. MCGINTY,
Secretary."

Petitioner presumes that aforesaid order was served upon all so-called class I carriers by railroad subject to the Act, and therefore avers that said order was served upon each of the carrier respondents.

Subsequently, the Commission issued its notice under date of August 13, 1931, entitled: "Ex Parte No. 104, Part II, Terminal Services of Class I Carriers. Notice of Information to be sought at hearings." In said notice, the Commission ostensibly defined "in

scope and restriction" said Part II of the aforesaid general
(5) inquiry as intended to establish facts concerning various services, charges, and practices of carriers subject to the Act, including, among others, terminal services and practices in the receipt and delivery of carload freight, including the spotting of cars, and all services and privileges, except transit and lighterage, incident to said terminal services within the meaning of Section 6 of the Interstate Commerce Act, which affect the measure of the transportation service performed at the line-haul rates and the value of such services to the consignors and consignees; the extent to which the line-haul rates include charges for such services; allowances and absorptions made out of the line-haul rates; and the extent to which such services reach beyond the carriers' terminals to particular locations on private tracks, sidings, industrial plant tracks, and on the rails of industrial common carriers.

The Commission conducted extended hearings in said proceeding at numerous places, at various times from September 15, 1931, to November 21, 1932; thereafter a "proposed report," was prepared by the Commission's Director of Service, W. P. Bartel, before whom the hearings had been held; exceptions were filed by numerous parties; and oral argument before the Commission was had. Thereafter the Commission issued its report, dated May 14, 1935, without order, which report has subsequently been described by the Commission as its original report in which it reviewed the subject matter of the inquiry generally and set forth its legal conclusions.

(6) A copy of said original report of the Commission, marked Appendix A, and a copy of said Forty-third Supplemental report, marked Appendix B, are attached hereto and are made a part hereof as fully as though set forth at length herein.

On or about September 24, 1935, petitioner filed with the Commission its petition for vacation of said order of September 12, 1935, upon various errors of fact and law alleged therein. Petitioner is not advised that the Commission has yet acted upon said petition.

V. The uniform custom and practice of all common carriers, in the State of Missouri and in other states throughout the Union, including the carriers named as respondents in this petition, is to state in their rate tariffs published and filed with the Commission, the city, town, or other station locality to and from which they undertake to transport freight at the rates and charges in such tariffs stated, without stating the precise spot in such city, town, or station locality at which they undertake to receive or deliver such freight. Under such tariffs it is and for many years has been the uniform custom and practice to include within the carload freight rates established and maintained for the transportation of carload freight the complete service comprehended in (a) the providing and furnishing of a suitable car for transportation and the placement of the car at any point reasonably accessible and convenient for loading on standard gauge tracks serving any and all industrial plants; and after the
(7) freight has been loaded in said cars by consignor, to remove the same and transport the goods therein to destination; and

(b) to deliver the carload freight by placing the car, wherein such freight is transported, at any point reasonably convenient for the unloading and removal of the freight from the car on the standard gauge tracks serving any and all industrial plants and to remove the empty car therefrom after the freight has been received and unloaded by the consignee. It is customary for railroads for various reasons sometimes to employ other railroad companies to complete their undertaking to spot the cars as aforesaid, and to pay such other railroads for such service, and sometimes to employ the shipper or receiver of freight to complete said undertaking to spot the cars as aforesaid and in such cases to compensate by payments termed allowances to such shippers and receivers of freight for such service. Respondent carriers have followed such customs generally in serving shippers and receivers of freight over their lines of road.

Pursuant to such custom, each of respondent carriers has always provided in its tariffs that, for the compensation afforded by its established rates for transportation between designated cities, towns, or other station localities, it would deliver and receive carload freight by the placement of the cars at any reasonable and convenient point for the loading or unloading thereof on the tracks serving the said plant of petitioner at Crystal City, Missouri, the same as at all plant, industries, and business establishments adjacent to its railroad and served by so-called private or industrial sidings.

(8) The duly filed and published tariffs of respondent carriers and all other carriers in the State of Missouri and in other states of the United States, as in effect now and for more than twenty years past, name rates for transportation covering the complete services described in this paragraph, with respect to carload freight moving to and from any and all railroad terminals and industries, plants, warehouses, or other business establishments; and the same rates have been applicable and have been applied by all of said carriers, whether carload shipments of freight originated on so-called public team tracks or on so-called private side tracks serving the plants, industries, and other business establishments and whether such shipments were delivered on so-called public team tracks or on so-called private side tracks as aforesaid.

VI. The record in the aforesaid investigation by the Commission in Ex Parté 104, Part II, contains abundant testimony by numerous witnesses supporting the averments in paragraph V hereof; and there is no evidence in said record to the contrary.

There is no evidence in said record that the carriers in serving any industry, plant, warehouse, or other business establishment have sought to limit their duty or terminate their obligation under the line-haul rates by placement of cars at any point short of or intermediate to the place mutually agreed upon with the shipper or consignee as reasonable and convenient for the loading or unloading of carload freight.

(9) VII. Section 1 of the Interstate Commerce Act, U. S. Code, title 49, Sec. 1, 41 Stat. L. 474, provides:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, * * *.

"(2) The provisions of this Act shall also apply to such transportation of passengers and property * * * but only in so far as such transportation * * * takes place within the United States, * * *

"(3) The term 'common carrier' as used in this Act shall include * * * all persons, natural or artificial, engaged in such transportation * * * as aforesaid as common carriers for hire. * * * The term 'railroad' as used in this Act shall include all * * * the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and (10) all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *

"(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of * * * property to provide and furnish such transportation upon reasonable request therefor, * * *."

Section 6 provides:

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property * * * will be carried, * * * and shall also state separately all terminal charges, * * * and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the * * * shipper, or consignee. * * *

(11) The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. * * *

"(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of * * * property, as defined in this Act, unless the rates, * * * and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates, * * * and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, * * * and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15, paragraph 13, provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maxi-
(12) mum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

VIII. Petitioner Pittsburgh Plate Glass Company for many years past has rendered the transportation service and furnished the instrumentalities employed in moving carloads of freight between the rails of respondent carriers adjacent to petitioner's plant, and convenient points of loading or unloading in said plant. The lines of said carrier respondents are adjacent to petitioner's plant, and have switch connections with petitioner's private sidings. For said terminal service petitioner has received from respondent Missouri-Pacific Railroad Company 75 cents per car, and from respondent St. Louis-San Francisco Railway Company, 65 cents per car.

IX. At the present time and for several years past each of respondent carriers herein has maintained its duly filed and published tariff providing for said payment to petitioner for the latter's transportation service of moving and placing cars at loading and unloading points in its plant.

X. Respondent carriers have filed with the Interstate Commerce Commission their respective tariffs to become effective October
(13) 31, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner.

Respondent carriers have given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of September 12, 1935, by the Interstate Commerce Commission, and

petitioner upon information and belief alleges that respondent carriers would not have filed the aforesaid tariffs cancelling said allowance were it not for the fear of incurring penalties for failure to comply with said order.

XI. The aforesaid order of the Commission instituting its investigation Ex Parte 104 on its own motion and without formal pleading, as set forth in paragraph IV of this petition, was not based upon any complaint or application of any sort submitted to the Commission by any person, either carrier or shipper, that the practice above described as in force at petitioner's plant was unreasonable, discriminatory, or in any way in violation of law, so far as known to petitioner. In the branch of said proceeding designated Part II, Terminal Services of Class I Carriers, in which the testimony relative to petitioner's plant was taken, no party, either carrier or shipper, presented any testimony purporting to show that said practice at petitioner's plant was unreasonable or discriminatory or otherwise in violation of law in any respect. Petitioner's representative appeared at said hearing in response to a request addressed to petitioner by the Secretary of the Commission, and said represent-
(14) ative in response to the call of the presiding Director of Service of the Commission became a witness and presented testimony describing said practice. No other testimony as to said practice at petitioner's plant was presented except on behalf of respondent carriers which respondents were party to said proceeding of investigation solely by virtue of the Commission's order instituting such investigation and making all so-called Class I railroads of the United States respondents therein, and said respondents presented their testimony in support of the existing practice and tariffs.

XII. The said report and order of September 12, 1935, as above set forth, is unlawful and void in the following respects:

1. The Commission was without authority to make the said order.

2. The Commission failed to make requisite findings sufficient to support its order.

3. The Commission's said report and order are arbitrary and in violation of previous rulings as to the duty of a common carrier by railroad to perform the service of placement of empty cars for load at, and removal of loaded cars from, point of loading, and placement of loaded car at, and removal of empty car from, point of unloading, within the plant of the petitioner.

4. There was no evidence upon which the Commission could find—

(a) That the respondents have complied with their obligation to petitioner under their rates for interstate transportation to
(15) deliver and receive carload freight when they place the cars containing said freight on the so-called interchange tracks described of record or remove the cars therefrom;

(b) That the service of moving cars beyond the so-called interchange tracks is a plant service;

(c) That by the payment of an allowance to petitioner for service performed by it in moving cars containing interstate shipments beyond the interchange tracks, respondents provide the means by which petitioner enjoys a preferential service not accorded to shippers generally;

(d) That to refund or remit a portion of the rates and charges collected or received as compensation for the transportation of property, as set forth in said supplemental report, is in violation of paragraph (7) of Section 6 of the Act.

5. The evidence on which the order is based shows conclusively that the terminal allowance paid by each of the respondent railroad companies to petitioner is for a transportation service embraced within the service for which the respondent railroad company publishes charges and receives the rates named in its tariffs of freight charges filed with the Interstate Commerce Commission; that the said terminal allowance is no more than just and reasonable and, being published in the tariffs of the respondent railroad company, is just as binding upon the respondent railroad company as is any rate named in its tariffs to be collected for the transportation of property by it in interstate commerce; and when the extent of
(16) the service of the carrier in the receipt and delivery of freight to be performed for the line haul rate is made clear by the published tariffs of the carrier and by the course of business followed by the carrier as recited above, and when it is stated in a tariff of the carrier that an allowance is made to the shipper or receiver of the freight for the performance of a part of said service, and the amount of such allowance is stated, such tariff being duly published and established and in force, such service and such allowance can not be in violation of Section 6 of the Interstate Commerce Act.

6. The evidence wholly fails to show any violation of law by the petitioner or by either of the respondent railroads in connection with the terminal allowance at petitioner's plant as above described.

7. The report and order were not entered after full hearing and due investigation; and petitioner was not accorded due notice and full hearing as required by the statute.

XIII. Petitioner has handled and will continue to handle for respondent carriers cars on which the terminal allowance payable as compensation for said handling is paid pursuant to the tariffs of respondent carriers providing for such payment, and said service cannot be paid for or compensated except as authorized and provided by duly filed and published tariff. Unless the order of the Commission be set aside and the respondent carriers be required to withdraw their cancelling tariff, plaintiff will be compelled to
(17) perform said service of transportation for the benefit of respondent carriers but at its own cost and expense, without the possibility of payment being made by said respondents in the

absence of tariff authority, thereby subjecting petitioner to irreparable loss and injury.

In consideration whereof and inasmuch as your petitioner has no adequate remedy at law, and may have relief only in a Court of Equity, petitioner prays that this petition be received and filed; that writs of subpoena be issued by the Clerk of the Court, as provided by law, commanding the United States of America and Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company to appear and defend this action; that notice hereof be given to the Attorney General of the United States and to the Interstate Commerce Commission; that upon the filing of this bill the Judge of this Court call to his assistance two other Judges, one of whom shall be a Circuit Judge, and that upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to said respondent carriers, the petitioner be granted an interlocutory injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order which requires respondent carrier to cease and desist on or before October 31, 1935, and thereafter to abstain from the practice in said order described; and that upon final hearing of this case,
(18) a decree be entered adjudging the said order to be in all respects null and void and permanently enjoining, annulling and setting aside the enforcement, operation, and execution of said order.

And petitioner further prays that a preliminary or interlocutory order or injunction be entered, requiring the railroad respondents to cancel the tariffs herein referred to, filed in alleged conformity with the said order of the Commission, and suspending the cancellation of the terminal allowance now being paid petitioner, until final determination of this cause, and that upon the final hearing herein, a decree be entered perpetually enjoining, suspending, annulling, and setting aside the said tariffs and requiring the said respondents to file new tariffs restoring the terminal allowances in effect on September 11, 1935, on interstate traffic handled by the petitioner at its said plant at Crystal City, Missouri, unless and until changed by agreement of the parties or by a lawful decision of the Interstate Commission.

Petitioner further prays, inasmuch as the purpose of the foregoing prayers for relief is to set aside the order of the Commission of September 12, 1935, and to restore the status quo of September 11, 1935, for such other and further orders of decrees as may be necessary to set aside said order of the Interstate Commerce Commission and to require the railroad respondents to vacate, annul and set aside any and all action which may have been taken under and by reason of said order of the Commission, and to take such action as
(19) may be necessary to restore the parties and properties affected by said order to the status of September 11, 1935, and for

such further and other relief in the premises as the nature of the case shall require, and to this court shall seem meet.

John S. Burchmore,
John S. Burchmore,
William W. Collin, Jr.,
William W. Collin, Jr.,
Solicitors for Petitioner.

Walter, Burchmore & Belnap,
1522 First National Bank Bldg., Chicago, Ill.

Patterson, Goehring, McClintock & Collin,
928 Frick Bldg., Pittsburgh, Pa.

(20) [*Duly sworn to by W. B. Higgins; jurat omitted in printing.*]

(21) Appendix A to petition omitted. Printed side page, 20 ante.

(98) *Appendix B to petition*

Interstate Commerce Commission

Pittsburgh Plate Glass Company Terminal Allowance, Crystal City, Mo.

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Submitted October 17, 1934. Decided September 12, 1935

Carriers' compensation under its line-haul rate found not to include service for which allowance is paid. Payment, therefore, found to be unlawful.

Same appearances as in original report.

Forty-Third Supplemental Report of the Commission

Division 6, Commissioners McManamy, Lee, and Miller

By Division 6:

In the original report in this proceeding, Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, certain principles were announced concerning the payment of allowances to industries for performing spotting service at their industrial plants, or the performance of such service by respondents in lieu of payment. This supplement report deals with the propriety and lawfulness of the allowances paid by the respondent carriers which serve the plant of the Pittsburgh Plate Glass Company, at Crystal City, Mo.

(99)

This company manufactures plate glass at Crystal City. The plant contains numerous buildings and about 27 railroad standard gage tracks approximately four miles in length, which reach the numerous points of unloading and loading within the plant. The plan is served by the Missouri-Illinois Railroad Company, a subsidiary of the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company hereinafter generally termed the Missouri Pacific and the Frisco respectively.

The main line of the Frisco from St. Louis, Mo., to Springfield, Mo., parallels the plant on the northeast side of the plant property and passes through a yard containing about 10 tracks located at the Crystal City station. One of the plant lead tracks parallels the Frisco main line and connects therewith at a point about 1,300 feet north of the Crystal City station. Another connection is made with the yard tracks about 500 or 600 feet northeast of the station with what is known as the Crystal City Railroad. This connection is seldom used, but to reach the plant through this connection it is necessary to cross the Frisco main line. Cars are delivered to
(100) the plant by the Frisco on any available track in the Crystal City yard. Outbound cars are placed on tracks in this yard designated by the agent at Crystal City. Cars consigned to the plant for the North are moved directly by the lead connection with the main line of the Frisco to Crystal City yard. The plant engines then move the cars in the reverse direction over the Frisco main track to point of connection with the plan lead track, thence over the lead track into the plant. The track layout in the plant is complicated and contains many sharp curves. The tracks encircle the plant and there are many spur tracks leading to the different loading or unloading points, at least one of which is elevated. All cars both loaded and empty are weighed on a scale within the plan property. All cars, except those to be loaded or unloaded on the track on which the scale is located, after weighing necessitate a back-up movement to the point of switch with other tracks for placement for loading or unloading. Likewise there is required a movement of the cars beyond the switch point leading to particular spurs and a back-up movement from the switch point to the points of loading or unloading on such spur tracks. Entrances to the plant are protected by gates and apparently ingress or egress therefrom could only be made with permission of the watchman located at the plant entrance. The Frisco has never actually placed cars within the plant but as far as 1908, it entered into an agreement with the Glass Company under which cars are to be delivered to or received from the Glass Company on the tracks in Crystal City yard above referred to.
(101) This agreement gave the Glass Company the right to operate its engine over the main line of the Frisco between the Crystal City yard and the point of connection with the plant tracks. Local trains of the Frisco operating through Crystal City usually arrive at that point late at night, and it would not be possible for the local to perform the necessary switching in the plant upon arrival, for the reason that the heavy locomotives could not operate over all the

plan tracks in performing the necessary spotting service because of curvature. Such spotting service could only be performed by the assignment of a switching locomotive at Crystal City. The switching engine could not be employed elsewhere in that vicinity which means that it would be necessary to pay for an eight-hour trick to perform the service at the plant. At the time of the hearing it was stated it would take approximately two hours to perform such service, but in normal times the amount of traffic to be handled would be between 20 and 30 cars, and it was testified it would then take approximately 5 hours due to the complications within the plant because it is necessary to operate slowly between and into buildings, and to protect the many employees working there.

From exhibits of record it appears clear that the present method of operation is the only feasible one. There appear to be no yards in the plant where inbound cars could be delivered in any volume or which would make classification of those cars for the various spotting locations possible. This is no doubt the reason for the receipt and delivery of cars in the Crystal City yard instead of making
(102) direct delivery through the lead track. The present tariff of the Frisco provides for an allowance to the industry for performing the service in the manner indicated, 65 cents per car for both loaded and empty. If an inbound loaded car is made empty and the empty moved to another point in the plant for loading outbound, four allowances are paid. It is contended that the cost to the industry of moving the empty cars from the track in the plant where it was made empty over the scale where it was weighed, thence to another track in the plant where it was to be loaded, would involve as much service as the movement of the empty car from the plant to Crystal yard and the bringing in of an empty from that yard to the point of loading.

Under the present arrangement for receipt and delivery of cars the Glass Company is enabled to spot cars when and as required by the plant.

The Pittsburgh Plate Glass Company many years ago acquired the Crystal City Plate Glass Company, which prior thereto had built what is known as the Crystal City Railroad. A branch of this railroad extends from the Mississippi River to the plant of the Glass Company. It was constructed to bring coal to the Glass Company arriving via barge. In 1923 the Mississippi River & Bonne Terre Railroad made connection with the Crystal City Railroad and received from and delivered traffic to the industry at a point on the Crystal River Railroad about 1,000 feet from the point of connection. For the movement of cars between this point and the points of loading and unloading within the plant the Glass Company received an allowance of $2.00 per loaded car, which for com-
(103) petitive reasons was participated in by the Missouri-Pacific.

On January 1, 1929, the Mississippi River & Bonne Terre was leased by the Missouri-Illinois Railroad and about the same time the Missouri-Pacific acquired control of the latter. On May 1, 1932, shortly before the hearing, the point of interchange with the plant

was changed to two open tracks of the Crystal River Railroad located 6,000 feet nearer the plant. The amount of the allowance was also changed at that time to 75 cents per car both loaded and empty. For the privilege of operating over the Crystal City Railroad to the present points of interchange the Missouri-Illinois maintains the tracks in a safe condition for the operation of its locomotives and furnishes the non-salvageable material. The Glass Company furnishes the salvageable material. As in the case of the Frisco the engines operating the local trains of the Missouri-Illinois could not operate over the plant tracks because of excessive curvature. Furthermore, if that carrier undertook to perform the switching it would be necessary to pass the point of connection with the Frisco northeast of the plant and cross the main line of that carrier in reaching the plant.

We find that the existing line-haul rates of the Frisco and the Missouri-Pacific must be construed as framed to cover the delivery and receipt of carload freight at reasonably convenient points; that the interchange track described of record constitutes such reasonable points; that the transportation services which it is the duty of the above respondent carriers to perform for the Glass Company begin and end at said interchange tracks; and that the movements by
(104) the Glass Company between the interchange tracks and loading and unloading points within its plant are plant services which it is not the duty of said respondent carriers to perform.

We further find that by the payment of an allowance for the service performed on interstate shipments beyond the interchange tracks described of record the respondent carriers provide the means by which the industry enjoys a preferential service not accorded by respondents to their shippers generally and by such payment respondent carriers refund or remit a portion of the rates or charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act.

An appropriate order will be entered.

ORDER

At a Session of the Interstate Commerce Commission, Division 6, held at its office in Washington, D. C., on the 12th day of September, A. D. 1935.

Pittsburgh Plate Glass Company Terminal Allowance, Crystal City, Mo.

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II. Terminal Services

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the alllowances paid
(105) by the Missouri-Pacific Railroad Company and the St. Louis-San Francisco Railway Company to the Pittsburgh Plate

Glass Company for performance by the latter of spotting service within its plant at Crystal City, Mo., and the Commission having under date of May 14, 1935, made and filed a report in Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowances paid to the Pittsburgh Plate Glass Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by payment of said allowances the carriers hereinbefore named violate the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company be, and they are hereby, notified and required to cease and desist on or before October 31, 1935, and thereafter to abstain from such unlawful practice.

By the Commission, Division 6.

[SEAL] GEORGE B. MCGINTY,
Secretary.

110 In United States District Court

No. 3110 Equity

[Title omitted.]

Order as to hearing

Filed July 31, 1935

And now, July 31, 1935, it appearing to the Court that the application for injunction in the above entitled case shall be heard and determined by three Judges, of whom at least one shall be a Circuit Judge,

It is hereby ordered, that Honorable J. Warren Davis be and is hereby authorized to sit as the Circuit Judge in the aforesaid case.

JOSEPH BUFFINGTON,
Senior Circuit Court Judge.

[File endorsement omitted.]

111 In United States District Court

No. 3111 In Equity

[Title omitted.]

Order as to hearing

Filed July 25, 1935

And now, this 25th day of July 1935, it appearing that the within Bill of Complaint has been filed in this Court, and motion having been made by counsel for plaintiff for hearing upon its application

for an interlocutory injunction, such application is set for hearing at 9 o'clock, a. m., on the 31st day of July 1935, notice of such hearing to be given to the Attorney General of the United States and to the Interstate Commerce Commission and to the Pennsylvania Railroad Company.

F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

112 In United States District Court

No. 3112 In Equity

[Title omitted.]

Order as to hearing

Filed July 25, 1935

And now, this 25th day of July 1935, it appearing that the within Bill of Complaint has been filed in this Court, and motion having been made by counsel for plaintiff for hearing upon its application for an interlocutory injunction, such application is set for hearing at 9 o'clock, a. m., on the 31st day of July 1935, notice of such hearing to be given to the Attorney General of the United States and to the Interstate Commerce Commission and to the Pennsylvania Railroad Company.

F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

113 In United States District Court

No. 3113 In Equity

[Title omitted.]

Order as to hearing

Filed July 25, 1935

And now, this 25th day of July 1935, it appearing that the within Bill of Complaint has been filed in this Court, and motion having been made by counsel for plaintiff for hearing upon its application for an interlocutory injunction, such application is set for hearing at 9 o'clock, a. m., on the 31st day of July 1935, notice of such hearing to be given to the Attorney General of the United States and to the Interstate Commerce Commission and to the Pennsylvania Railroad Company.

F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

114 In United States District Court

No. 3130. In Equity

[Title omitted.]

Order as to hearing

Filed Sept. 3, 1935

And now, this 8th day of October 1935, it appearing that the within Bill of Complaint has been filed in this Court, and motion having been made by counsel for plaintiff for hearing upon its application for an interlocutory injunction, such application is set for hearing at 9 o'clock a. m., Eastern Standard Time, on the 12th day of September 1935, notice of such hearing to be given to the Attorney General of the United States and to the Interstate Commerce Commission and to the Pennsylvania Railroad Company.

R. M. GIBSON,
District Judge.

[File endorsement omitted.]

115 In United District Court

No. 3136. In Equity

[Title omitted.]

Order as to hearing

Filed Oct. 8, 1935

And now, this 8th day of October 1935, it appearing that the within Petition has been filed in this Court, and motion having been made by counsel for plaintiff for hearing upon its application for interlocutory injunction, such application is set for hearing at ten o'clock a. m., on the 22nd day of October 1935, notice of such hearing to be given to the Attorney General of the United States and to the Interstate Commerce Commission and to Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company.

R. M. GIBSON,
District Judge.

[File endorsement omitted.]

116 In United States District Court

In Equity. No. 3110

[Title omitted.]

Answer of United States of America

Filed Aug. 23, 1935

United States, one of the above named defendants, for answer to the bill of complaint filed herein against it says:

I

United States admits that the facts alleged in paragraphs numbered (1), (2), (3), and (4) of the bill are true, including the fact alleged in said paragraph 3 that this court has jurisdiction of this suit under the provisions of the Act of October 22, 1913, 38 Stat. L. 219, but United States denies the further assertion in said paragraph that this court has any "general equity jurisdiction" over the subject matter of the suit.

II

United States denies the matters, things, and conclusions alleged in paragraphs (5) and (6) of the bill, except that it admits that it is the duty of railroads, including the railroad defendant herein,
117 under their line-haul rates, to perform reasonable terminal and switching services to effect the receipt and delivery of carloads of freight, and United States further admits that under section 15, paragraph 13, of the Interstate Commerce Act, a shipper which performs any part of the services which it is the duty of carriers to perform, is entitled to a reasonable allowance therefor, but United States denies that the service performed by plaintiff in switching and spotting cars within its private grounds and plant is a service which it is the duty of the defendant carrier to perform or for which it may lawfully pay an allowance to plaintiff.

III

Answering paragraph (7) of the bill, United States admits that defendant Pennsylvania Railroad Company has published and maintained tariffs of the description and containing the language set forth in said paragraph, and United States further admits that said tariffs provide for an allowance to plaintiff when it "performs the terminal switching service" for the Pennsylvania Railroad Company, but the United States denies that said tariffs mention or include in said terminal switching service the movement and placing of cars by plaintiff "at loading and unloading points in its plant" as alleged in said paragraph (7), and United States further denies the allegation in said paragraph that the payment by said Pennsylvania Railroad Company of an allowance to plaintiff for moving and placing cars within its private grounds and plant for loading and unloading is lawful.

IV

United States admits the allegations of paragraph (8) of the bill except that it disclaims any knowledge as to whether defendant Pennsylvania Railroad Company has given plaintiff any reason for cancelling the allowances therein mentioned, and as to whether the Pennsylvania Railroad Company would have cancelled said
118 allowances but for said order of the Interstate Commerce Commission; and in this connection, United States alleges that had said defendant Pennsylvania Railroad Company not elected to abide by said order of the Commission, it had and still has, but has not asserted the right provided by statute, to sue in this court to enjoin and annul said order of the Commission.

V

United States denies the matters, things, and conclusions alleged in paragraph (9) of the bill and in the several subdivisions thereof, and denies that said order of the Interstate Commerce Commission issued July 5, 1935, is unlawful for the reasons therein alleged or for any other reason.

VI

United States denies the allegations contained in paragraph (10) of the bill and particularly denies that plaintiff will suffer irreparable loss or injury unless said order of the Commission is enjoined, and United States alleges that if the Commission's said order be finally held to be unlawful, plaintiff has not only a remedy in law, but also a remedy in equity, to recover whatever money, if any it may be entitled to receive for performance of any transportation service for the Pennsylvania Railroad Company pending final determination of this suit.

VII

Except as expressly admitted herein, United States denies each and every allegation made and contained in the bill of complaint and in the several separate paragraphs and subdivisions thereof.
119 Wherefore, having fully answered the bill of complaint, United States prays that the relief therein prayed be denied and that the bill of complaint be dismissed with costs to the plaintiff, and that it have the benefit of such other and further orders, decrees, and relief as may be just and proper.

Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General.

John Dickinson,
JOHN DICKINSON,
Assistant Attorney General.
Horatio S. Dumbault,
HORATIO S. DUMBAULT,
United States Attorney.

120 [*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*]

[File endorsement omitted.]

121 In United States District Court

In Equity No. 3111.

[Title omitted.]

Answer of United States of America

Filed Aug. 23, 1935

United States, one of the above defendants, for answer to the petition filed herein against it says:

I

United States admits that the facts alleged in paragraphs numbered I, II, III, and IV of the Petition are true, except that United States denies that the suit is maintainable under the general equity jurisdiction of this court as asserted in said paragraph III.

II

United States denies the matters, things, and conclusions alleged in paragraph V of the Petition, except that it admits that it is the duty of defendant Pennsylvania Railroad Company under its line-haul rates to perform reasonable terminal switching service to effect the receipt and delivery of carload freight, but United States denies that said Pennsylvania Railroad Company may lawfully perform without charge in addition to its line-haul rates the service of
122 switching and spotting cars within the private grounds and plant of petitioner and further denies that it may lawfully pay an allowance out of said line-haul rates to petitioner for performing said service; and United States further denies that said service is a transportation service within the meaning of the Interstate Commerce Act, but alleges that it is a plant service as found by the Commission in its reports annexed as Appendices A and B to the Petition.

III

United States denies the allegations contained in paragraph VI of the Petition.

IV

Answering paragraph VII of the Petition, United States admits that the Interstate Commerce Act contains provisions which are quoted in part in said paragraph.

V

United States admits the truth of the facts alleged in paragraph VIII of the Petition but denies that said allegations lend legality to the payment of allowances to petitioner by defendant Pennsylvania Railroad Company for the performance of alleged switching and spotting of cars within its plant; denies that the allegations of said paragraph contain a full, complete or accurate statement of the facts and circumstances concerning said service and payment and for such full, complete and accurate statement the court is respectfully referred to the full text of the Commission's report annexed as Appendix B to the Petition.

VI

Answering paragraphs IX and X of the Petition, United States admits that defendant Pennsylvania Railroad Company has
123 published the tariffs set forth and described in said paragraphs, but denies that the tariff described in said paragraph IX makes it lawful for said defendant to pay the allowances therein provided to the petitioner for the services found by the Commission, in its report annexed as Appendix B to the Petition, to be plant services. Further answering said paragraph X United States disclaims any knowledge as to whether defendant Pennsylvania Railroad Company has given petitioner any reason for the cancellation of said allowances and alleges in this connection that had said Pennsylvania Railroad not elected to comply with said order of the Commission, it could have sought to enjoin said order by suit in its own behalf under statute especially providing such remedy, but that it has not availed itself of that right.

VII

Answering paragraph XI of the Petition, United States admits, as therein alleged, that representatives of both the petitioner and the Pennsylvania Railroad Company appeared pursuant to notice and presented their testimony at hearings conducted by the Interstate Commerce Commission concerning the payment to petitioner of said allowance by the Pennsylvania Railroad Company; but United States says that the remaining allegations of said paragraph XI are argumentative and conclusory and therefore require no answer.

VIII

United States denies the allegations contained in paragraph XII of the Petition and in the subdivisions thereof, and denies that said order of the Commission issued June 7, 1935, is unlawful or void for the reasons therein set forth or for any other reason.

124

IX

Answering paragraph XIII of the Petition, United States admits that the annual report of the Interstate Commerce Commission rendered to Congress in 1905 contained the language set forth in said paragraph, admits that sections 1, 6, and 15 of the Interstate Commerce Act were amended to include and contain the language set forth in said paragraph, but United States denies the remaining allegations of said paragraph.

X

United States denies the allegations of paragraph XIV of the Petition and particularly denies that petitioner would suffer irreparable loss and injury unless said order of the Commission is enjoined; and United States alleges in this connection that even though petitioner be deprived of the allowances pending the final determination of this suit, it has remedies at law and in equity to recover the amount of said allowances if said order of the Commission be finally held to be unlawful.

XI

Except as herein expressly admitted, United States denies each and every allegation contained in the Petition and in the several paragraphs and subdivisions thereof.

Wherefore, having fully answered the Petition, the United States prays that the relief therein prayed be denied and that the
125 Petition be dismissed with costs to the petitioner, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General.

John Dickinson,
JOHN DICKINSON,
Assistant Attorney General.
Horatio S. Dumbault,
HORATIO S. DUMBAULT,
United States Attorney.

126 [*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*]

[File endorsement omitted.]

127 In United States District Court

In Equity No. 3112

[Title omitted.]

Answer of United States of America

Filed Aug. 23, 1935

United States, one of the above defendants, for answer to the Petition filed herein against it, says:

I

United States admits that the facts alleged in paragraphs numbered I, II, III, and IV of the Petition are true, except that United States denies that the suit is maintainable under the general equity jurisdiction of this court as asserted in said paragraph III.

II

United States denies the matters, things, and conclusions alleged in paragraph V of the Petition, except that it admits that it is the duty of defendant Pennsylvania Railroad Company under its line-haul rates to perform reasonable terminal and switching service to effect the receipt and delivery of carload freight, but United States denies that said Pennsylvania Railroad Company may lawfully perform without charge in addition to its line-haul rates the service of switching and spotting cars within the private grounds
128 and plant of petitioner and further denies that it may lawfully pay an allowance out of said line-haul rates to petitioner for performing said service; and United States further denies that said service is a transportation service within the meaning of the Interstate Commerce Act, but alleges that it is a plant service as found by the Commission in its reports annexed as Appendices A and B to the Petition.

III

United States denies the allegations contained in paragraph VI of the Petition.

IV

Answering paragraph VII of the Petition, United States admits that the Interstate Commerce Act contains provisions which are quoted in part in said paragraph.

V

United States admits the truth of the facts alleged in paragraph VIII of the Petition, but denies that said allegations lend legality to the payment of allowances to petitioner by defendant Pennsylvania

Railroad Company for the performance of alleged switching and spotting of cars within its plant; denies that the allegations of said paragraph contain a full, complete, or accurate statement of the facts and circumstances concerning said service and payment and for such full, complete, and accurate statement the court is respectfully referred to the full text of the Commission's report annexed as Appendix B to the Petition.

VI

Answering paragraphs IX and X of the Petition, United States admits that defendant Pennsylvania Railroad Company has
129 published the tariffs set forth and described in said paragraphs, but denies that the tariff described in said paragraph IX makes it lawful for said defendant to pay the allowances therein provided to the petitioner for the services found by the Commission, in its report annexed as Appendix B to the Petition, to be plant services. Further answering said paragraph X United States disclaims any knowledge as to whether defendant Pennsylvania Railroad Company has given petitioner any reason for the cancellation of said allowances and alleges in this connection that had said Pennsylvania Railroad not elected to comply with said order of the Commission, it could have sought to enjoin said order by suit in its own behalf under statute especially providing such remedy, but that it has not availed itself of that right.

VII

Answering paragraph XI of the Petition, United States admits, as therein alleged, that representatives of both the petitioner and the Pennsylvania Railroad Company appeared pursuant to notice and presented their testimony at hearings conducted by the Interstate Commerce Commission concerning the payment to petitioner of said allowance by the Pennsylvania Railroad Company; but United States says that the remaining allegations of said paragraph XI are argumentative and conclusory and therefore require no answer.

VIII

United States denies the allegations contained in paragraph XII of the Petition and in the subdivisions thereof, and denies that said order of the Commission issued June 25, 1935, is unlawful or void for the reasons therein set forth or for any other reason.

130 IX

Answering paragraph XIII of the Petition, United States admits that the annual report of the Interstate Commerce Commission rendered to Congress in 1905 contained the language set forth in said paragraph, admits that sections 1, 6, and 15 of the Interstate Commerce Act were amended to include and contain the language set

forth in said paragraph, but United States denies the remaining allegations of said paragraph.

X

United States denies the allegations of paragraph XIV of the Petition and particularly denies that petitioner would suffer irreparable loss and injury unless said order of the Commission is enjoined; and United States alleges in this connection that even though petitioner be deprived of the allowances pending the final determination of this suit, it has remedies at law and in equity to recover the amount of said allowances if said order of the Commission be finally held to be unlawful.

XI

Except as herein expressly admitted, United States denies each and every allegation contained in the Petition and in the several paragraphs and subdivisions thereof.

Wherefore, having fully answered the petition, the United States prays that the relief therein prayed be denied and that the petition be dismissed with costs to the petitioner, and that
131 it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General.

John Dickinson,
JOHN DICKINSON,
Assistant Attorney General.
Horatio S. Dumbault,
HORATIO S. DUMBAULT,
United States Attorney.

132 [*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*]

[File endorsement omitted.]

133 In United States District Court

In Equity No. 3113

[Title omitted.]

Answer of United States of America

Filed Aug. 23, 1935

United States, one of the above defendants, for answer to the Petition filed herein against it says:

I

United States admits that the facts alleged in paragraphs numbered I, II, III, and IV of the Petition are true, except that United States denies that the suit is maintainable under the general equity jurisdiction of this court as asserted in said paragraph III.

II

United States denies the matters, things, and conclusions alleged in paragraph V of the Petition, except that it admits that it is the duty of defendant Pennsylvania Railroad Company under its line-haul rates to perform reasonable terminal and switching service to effect the receipt and delivery of carload freight, but United States denies that said Pennsylvania Railroad Company may lawfully perform without charge in addition to its line-haul rates the
134 service of switching and spotting cars within the private grounds and plant of petitioner and further denies that it may lawfully pay an allowance out of said line-haul rates to petitioner for performing said service; and United States further denies that said service is a transportation service within the meaning of the Interstate Commerce Act, but alleges that it is a plant service as found by the Commission in its reports annexed as appendices A and B to the Petition.

III

United States denies the allegations contained in paragraph VI of the Petition.

IV

Answering paragraph VII of the Petition, United States admits that the Interstate Commerce Act contains provisions which are quoted in part in said paragraph.

V

United States admits the truth of the facts alleged in paragraph VIII of the Petition but denies that said allegations lend legality to performance by said Pennsylvania Railroad Company of the service of moving cars to and from points within petitioner's plant, or to the payment of allowances by defendant Pennsylvania Railroad Company to petitioner for the performance of said service; denies that the allegations of said paragraph contain a full, complete, or

accurate statement of the facts and circumstances concerning said service and for such full, complete, and accurate statement the court is respectfully referred to the full text of the Commission's report annexed as appendix B to the Petition.

VI

Answering paragraphs IX and X of the Petition, United States admits that defendant Pennsylvania Railroad Company has
135 published the tariffs set forth and described in said paragraphs, but denies that the tariff described in said paragraph IX makes it lawful for said defendant to render said service or to pay the allowances therein provided to the petitioner for the services found by the Commission, in its report annexed as Appendix B to the Petition, to be plant services. Further answering said paragraph X, United States disclaims any knowledge as to whether defendant Pennsylvania Railroad Company has given petitioner any reason for the cancellation of said allowances and alleges in this connection that had said Pennsylvania Railroad not elected to comply with said order of the Commission, it could have sought to enjoin said order by suit in its own behalf under statute especially providing such remedy, but that it has not availed itself of that right.

VII

Answering paragraph XI of the Petition, United States admits, as therein alleged, that representatives of both the petitioner and the Pennsylvania Railroad Company appeared pursuant to notice and presented their testimony at hearings conducted by the Interstate Commerce Commission concerning the payment to petitioner of said allowance by the Pennsylvania Railroad Company; but United States says that the remaining allegations of said paragraph XI are argumentative and conclusory and therefore require no answer.

VIII

United States denies the allegations contained in paragraph XII of the Petition and in the subdivisions thereof, and denies that said order of the Commission issued June 24, 1935, is unlawful or void for the reasons therein set forth or for any other reason.

136 IX

Answering paragraph XIII of the petition, United States admits that the annual report of the Interstate Commerce Commission rendered to Congress in 1905 contained the language set forth in said paragraph, admits that sections 1, 6, and 15 of the Interstate Commerce Act were amended to include and contain the language set forth in said paragraph, but United States denies the remaining allegations of said paragraph.

X

United States denies the allegations of paragraph XIV of the petition and particularly denies that petitioner would suffer irreparable loss and injury unless said order of the Commission is enjoined; and United States alleges in this connection that even though petitioner be required to pay said Pennsylvania Railroad Company for said movement of cars within its plant, pending the final determination of this suit, it has remedies at law and in equity to recover the amount so paid if said order of the Commission be finally held to be unlawful.

XI

Except as herein expressly admitted, United States denies each and every allegation contained in the Petition and in the several paragraphs and subdivisions thereof.

Wherefore, having fully answered the Petition, the United States prays that the relief therein prayed be denied and that the
137 Petition be dismissed with costs to the petitioner, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General.

John Dickinson,
JOHN DICKINSON,
Assistant Attorney General.

Horatio S. Dumbault,
HORATIO S. DUMBAULT,
United States Attorney.

138 [*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*]

[File endorsement omitted.]

139 In United States District Court

In Equity No. 3130

[Title omitted.]

Answer of United States of America

Filed Sept. 12, 1935

United States, one of the above-named defendants, for answer to the petition filed herein against it says:

I

United States admits for the purposes of this suit that the facts alleged in paragraph I, II, III, and IV of the petition are true, except that it denies the allegation in said paragraph III that the suit is brought under the general equity jurisdiction of this Court.

II

United States denies the matters, things, and conclusions alleged in paragraph V and VI of the petition.

III

United States admits that the Interstate Commerce Act contains provisions which include, among others, those quoted in paragraph VII of the petition.

IV

United States admits that the facts alleged in paragraphs
140 VIII and IX of the petition are true, but denies that the movement of cars by petitioner with its own locomotives within its private plant and grounds constitutes a transportation service within the meaning of the Interstate Commerce Act, denies that said service is rendered for the defendant railroad company, and denies that said railroad company may lawfully pay the allowance mentioned in said paragraphs to petitioner for performing said service, and denies further that said railroad company may lawfully perform said service without extra charge in addition to its line-haul rates.

V

Answering paragraph X of the petition, United States admits that the defendant railroad company has filed its tariff providing for the cancellation of its tariff which names the allowance to petitioner, but United States disclaims sufficient knowledge to enable it to state whether said railroad company has given the petitioner any reason for cancelling said allowance tariff, and alleges in this connection that if said railroad company had not elected voluntarily to obey said order issued by the Interstate Commerce Commission on July 29, 1935, requiring cancellation of said allowance tariff,

it could have brought suit to enjoin said order pursuant to express statutory provision, but that it has not availed itself of that right.

VI

United States denies each and every allegation made and contained in paragraphs XI and XII of the petition, except that it admits that petitioner's representative and representatives of the defendant railroad company appeared pursuant to notice at
141 hearings conducted by the Interstate Commerce Commission and submitted such testimony as they desired concerning the payment of said allowance to petitioner, and concerning the movement of cars from, to, and within petitioner's plant, and the circumstances under which said switching and movement of cars is performed by petitioner.

VII

United States denies the matters, things, and conclusions alleged in paragraphs XIII and XIV of the petition, except that it admits that the 1905 Annual Report of the Interstate Commerce Commission to Congress contained the language quoted in said paragraph XIII, and admits that the Interstate Commerce Act was amended in the particulars therein set forth. And United States particularly denies that petitioner will suffer irreparable loss and injury if said order of said Commission is not enjoined and annulled, and denies further that petitioner has no adequate remedy at law.

VIII

Except as herein expressly admitted, United States denies each and every allegation contained in the petition, and in the several subdivisions and paragraphs thereof.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and the petition dismissed with costs to the petitioner, and that it have the benefit of such other and further orders, decrees or relief as may be just and proper.

Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General.

John Dickinson,
JOHN DICKINSON,
Assistant Attorney General.

Horatio S. Dumbault,
HORATIO S. DUMBAULT,
United States Attorney.

(142) [*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*]

[File endorsement omitted.]

(143) In United States District Court

In Equity No. 3136

[Title omitted.]

Answer of the United States of America

Filed Oct. 16, 1935

United States of America, one of the defendants in the above entitled cause, for answer to the petition filed herein against it, answers and says:

I

United States admits that the facts alleged in paragraphs I, II, III, and IV of the petition are true, except that it denies the allegation in said paragraph III that this suit can be maintained under the general equity juridiction of this Court.

II

United States denies the matters, things, and conclusions alleged in paragraphs V and VI of the petition.

III

Answering paragraph VII of the petition, United States admits that the Interstate Commerce Act contains the provisions therein quoted.

IV

Answering paragraphs VIII and IX of the petition, United States admits that petitioner has performed with its own instrumen-
(144) talities the movement and switching of cars between the interchange tracks of the respondent carriers and points within its private plant at which it desired to load and unload said cars, and further admits that the respondent carriers have published their tariffs providing for the payment to petitioner of specified amounts as an allowance for performing said switching service, but United States denies that said movement of cars within petitioner's private plant and grounds constitutes a transportation service within the meaning of the Interstate Commerce Act, denies that petitioner may lawfully receive any allowance therefor and denies that the respondent carriers may lawfully pay an allowance to petitioner for performing said service.

V

Answering paragraph X of the petition, United States admits that the respondent carriers have filed the tariff therein mentioned with the Interstate Commerce Commission, but United States disclaims any knowledge as to whether said carriers had given petitioner any reason for filing said tariff, and alleges in this connection that had said carriers not elected to obey voluntarily the order issued by the Interstate Commerce Commission September 12, 1935, they were at liberty to bring suit to enjoin the order pursuant to express statutory provisions, but have not availed themselves of that remedy.

VI

United States denies each and every allegation contained in paragraphs XI, XII, and XIII of the petition and denies that the order issued by the Interstate Commerce Commission on September 12, 1935, is unlawful for any of the reasons alleged in said paragraphs or for any other reason; and United States further denies the (145) allegation in said paragraph XIII that petitioner will suffer irreparable loss and injury unless said order is enjoined and denies that petitioner is without adequate remedy at law. Further answering said paragraph XIII, United States denies that this Court has power or jurisdiction to require suspension or cancellation of the tariffs filed by the respondent carriers for the purpose of complying with said order, and further denies that this Court has jurisdiction to grant the further relief prayed in said paragraph XIII, namely, that the respondent carriers be required by the Court to file new tariffs restraining said allowances to petitioner.

VII

Except as herein expressly admitted, United States denies each and every allegation made and contained in the petition and in the several separate paragraphs and subdivisions thereof.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and the petition dismissed with costs to the petitioner, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General.

John Dickinson,
JOHN DICKINSON,
Assistant Attorney General.
Horatio S. Dumbault,
HORATIO S. DUMBAULT,
United States Attorney.

146 [*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*].

[File endorsement omitted.]

147 In United States District Court

In Equity No. 3110

[Title omitted.]

Intervention of Interstate Commerce Commission

(Filed July 31, 1935)

To the Honorable the Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, Sup. VI, title 28, sec. 45a), I hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of myself, as its counsel, in the above-entitled suit.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON,
Chief Counsel.

[File endorsement omitted.]

148 In United States District Court

In Equity No. 3110

[Title omitted.]

Answer of Interstate Commerce Commission

Filed July 31, 1935

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs (1) and (2) of the bill of complaint, the Commission, for the purposes of this suit, admits that the allegations therein contained are true.

149 II

Answering paragraphs (3) to (10), inclusive, of the bill of complaint, the Commission admits and alleges that it made the main report dated May 14, 1935, referred to in paragraph (4) of the bill of complaint, and the eighteenth supplemental report and order dated July 5, 1935, referred to in said paragraph (4), copies of which, respectively, are attached to the bill of complaint as Exhibit A, Exhibit B, and Exhibit C, in a proceeding then pending before the Commission and entitled Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, which proceeding was instituted by the Commission on its own motion, for the purpose, among others, of determining whether certain practices of what are referred to in said main report as Class I carriers, relating to the terminal services and affecting the operating revenues and expenses, of said carriers, were in violation of the Interstate Commerce Act; and the Commission respectfully refers the Court to the text of said reports and order for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties thereto, including the plaintiff herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said exhibits was submitted to the Commission for
150 consideration, including testimony and other evidence submitted on behalf of plaintiff herein, by the counsel of said parties; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and duly served upon the plaintiff herein, and upon other interested parties, its said reports and order; that said reports and order included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

151 The Commission further alleges that said order of July 5, 1935, was not made or entered either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

Further and particularly answering paragraph (9) of the bill of complaint, the Commission denies each of and all the allegations therein contained.

The Commission specifically denies that, as alleged in paragraph (10) of the bill of complaint, plaintiff will suffer irreparable loss and injury, unless said order of July 5, 1935, is set aside.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said main report of May 14, 1935, and in said eighteenth supplemental report and order of July 5, 1935, which reports and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to
152 aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

153 [*Duly sworn to by Frank McManamy; jurat omitted in printing.*]

[File endorsement omitted.]

154 In United States District Court

In Equity. No. 3111

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed July 31, 1935

To the Honorable the Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, sup. VI, title 28, sec. 45a), I hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of myself, as its counsel, in the above entitled suit.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

[File endorsement omitted.]

155 In United States District Court

In Equity. No. 3111

[Title omitted.]

Answer of Interstate Commerce Commission

Filed July 31, 1935

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

156 I

Answering paragraphs I and II of the petition, the Commission, for the purposes of this suit, admits that the allegations therein contained are true.

II

Answering paragraphs III to XIV, inclusive, of the petition, the Commission admits and alleges that it made the original report dated May 14, 1935, referred to in paragraph IV of the petition, and the Eleventh Supplemental Report and Order dated June 7, 1935, referred to in paragraph III of the petition, copies of which, respectively, are attached to the petition as Appendix A and Appendix B, in a proceeding then pending before the Commission and entitled Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, which proceeding was instituted by the Commission on its own motion, for the purpose, among others, of determining whether certain practices of what are referred to in said original report as Class I carriers, relating to the terminal services and affecting the operating revenues and expenses of said carriers, were in violation of the Interstate Commerce Act; and the Commission respectfully refers the Court to the text of said reports and order for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties thereto, including the petitioner herein, were, and that each of
157 them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said appendixes was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioner herein, by the counsel for said parties; that at said hearing and subsequently, both orally and in briefs filed in

said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and duly served upon the petitioner herein, and upon other interested parties, its said reports and order; that said reports and order included the Commission's finding of fact, decision, conclusions, order, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own
158 knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the petition herein.

The Commission further alleges that said order of June 7, 1935, was not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said petition.

Further and particularly answering paragraph XII of the petition, the Commission denies each of and all the allegations therein contained.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said original report of May 14, 1935, and in said Eleventh Supplemental Report and Order of June 7, 1935, which reports and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

159 [*Duly sworn to by Frank McManamy; jurat omitted in printing.*]

[File endorsement omitted.]

160 In United States District Court

In Equity No. 3112

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed July 31, 1935

To the Honorable the Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, sup. VI, title 28, sec. 45a), I hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of myself, as its counsel, in the above entitled suit.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

[File endorsement omitted.]

161 In United States District Court

In Equity No. 3112

[Title omitted.]

Answer of Interstate Commerce Commission

Filed July 31, 1935

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I and II of the petition, the Commission, for the purposes of this suit, admits that the allegations therein contained are true.

162 II

Answering paragraphs III to XIV, inclusive, of the petition, the Commission admits and alleges that it made the original report dated May 14, 1935, referred to in paragraph IV of the petition, and the seventeenth supplemental report and order dated June 25, 1935, referred to in paragraph III of the petition, copies of which, respectively, are attached to the petition as Appendix A and Ap-

pendix B, in a proceeding then pending before the Commission and entitled Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, which proceeding was instituted by the Commission on its own motion, for the purpose, among others, of determining whether certain practices of what are referred to in said original report as Class I carriers, relating to the terminal services and affecting the operating revenues and expenses of said carriers were in violation of the Interstate Commerce Act; and the Commission respectfully refers the Court to the text of said reports and order for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties thereto, including the petitioner herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said appendixes was submitted to the Commission for consid-
163 eration, including testimony and other evidence submitted on behalf of petitioner herein, by the counsel of said parties; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and duly served upon the petitioner herein, and upon other interested parties, its said reports and order; that said reports and order included the Commission's findings of fact, decision, conclusions, order, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the petition herein.

The Commission further alleges that said order of June 25,
164 1935, was not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said petition.

Further and particularly answering paragraph XII of the petition, the Commission denies each of and all the allegations therein contained.

The Commission specifically denies that, as alleged in paragraph XIV of the petition, petitioner will suffer irreparable loss and injury, unless said order of June 25, 1935, is set aside.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said original report of May 14, 1935, and in said seventeenth supplemental report and order of June 25, 1935, which reports and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

165 [*Duly sworn to by Frank McManamy; jurat omitted in printing.*]

[File endorsement omitted.]

166 In United States District Court

In Equity. No. 3113

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed July 31, 1935

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, sup. VI, title 28, sec. 45a), I hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of myself as its counsel, in the above entitled suit.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

[File endorsement omitted.]

167 In United States District Court

In Equity. No. 3113

[Title omitted.]

Answer of Interstate Commerce Commission

Filed July 31, 1935

The Interstate Commerce Commission, intervening defendant in in the above-entitled suit, now and at all times hereafter saving and

reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I and II of the petition, the Com-
168 mission, for the purposes of this suit, admits that the allegations therein contained are true.

II

Answering paragraphs III to XIV, inclusive, of the petition, the Commission admits and alleges that it made the original report dated May 14, 1935, referred to in paragraph IV of the petition, and the fifteenth supplemental report and order, dated June 24, 1935, referred to in paragraph III of the petition, copies of which, respectively, are attached to the petition as Exhibit A and Exhibit B, in a proceeding then pending before the Commission and entitled Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, which proceeding was instituted by the Commission on its own motion, for the purpose, among others, of determining whether certain practices of what are referred to in said original report as Class I carriers, relating to the terminal services and affecting the operating revenues and expenses of said carriers, were in violation of the Interstate Commerce Act; and the Commission respectfully refers the Court to the text of said reports and order for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties thereto, including the petitioner herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said exhibits was submitted to the Commission for consideration,
including testimony and other evidence submitted on behalf of
169 petitioner herein, by the counsel for said parties; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and duly served upon the petitioner herein, and upon other interested parties, it said reports and order; that said reports and order included the Commission's findings of fact, decision, conclusions, order, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings

and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the petition herein.

The Commission further alleges that said order of June 24, 1935, was not made or entered, either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it;
170 that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said petition.

Further and particularly answering paragraph XII of the petition, the Commission denies each of and all the allegations therein contained.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said original report of May 14, 1935, and said fifteenth supplemental report and order of June 24, 1935, which reports and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honrable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

171 [*Duly sworn to by Frank McManamy; jurat omitted in printing.*]

[File endorsement omitted.]

172 In United States District Court

In Equity. No. 3130

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed Sept. 9, 1935

To the Honorable the Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, Sup. VII, title 28, sec. 45a), I hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of myself as its counsel, in the above-entitled suit.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*
E. M. REIDY.

[File endorsement omitted.]

173 In United States District Court

In Equity No. 3130

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Sept. 9, 1935

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I and II of the petition, the Commission, for the purposes of this suit, admits that the allegations therein contained are true.

174 II

Answering paragraphs III to XIV, inclusive, of the petition, the Commission admits and alleges that it made the original report dated May 14, 1935, referred to in paragraph IV of the petition, and the Thirty-fifth Supplemental Report and order dated July 29, 1935, referred to in paragraph III of the petition, copies of which, respectively are attached to the petition as Appendix A and Appendix B, in a proceeding then pending before the Commission and entitled Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, which proceeding was instituted by the Commission on its own motion, for the purpose, among others, of determining whether

certain practices of what are referred to in said original report as Class I carriers, relating to the terminal services and affecting the operating revenues and expenses, of said carriers, were in violation of the Interstate Commerce Act; and the Commission respectfully refers the Court to the text of said reports and order for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties thereto, including the petitioner herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said appendixes was submitted to the Commission for consideration, including testimony and other evidence submitted
(175) on behalf of petitioner herein, by counsel of said parties; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and duly served upon the petitioner herein, and upon other interested parties, its said reports and order; that said reports and order included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the petition herein.

The Commission further alleges that said order of July 29, 1935, was not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that
(176) in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said petition.

Further and more particularly answering paragraph XII of the petition, the Commission denies each of and all the allegations therein contained.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the peti-

tion, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said original report of May 14, 1935, and in said Thirty-fifth Supplemental Report and order of July 29, 1935, which reports and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
By E. M. REIDY.

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

177 [*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

[File endorsement omitted.]

178 In United States District Court

In Equity No. 3136

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed Oct. 18, 1935

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, sup. VI, title 28, sec. 45a), I hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of myself as its counsel, in the above-entitled suit.

DANIEL W. KNOWLTON,
Chief Counsel.

OCTOBER 16, 1935.

[File endorsement omitted.]

179 In United States District Court

In Equity, No. 3136

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Oct. 18, 1935

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of

exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I and II of the petition, the Commission, for the purposes of this suit, admits that the allegations therein contained are true.

180

II

Answering paragraphs III to XII, inclusive, of the petition, the Commission admits and alleges that it made the original report dated May 14, 1935, referred to in paragraph IV of the petition, and the Forty-third Supplemental Report dated September 12, 1935, referred to in said paragraph IV and also in paragraph III of the petition, and also made the order dated September 12, 1935, referred to in said paragraph III, copies of which, respectively, are attached to the petition as Appendix A and Appendix B, in a proceeding then pending before the Commission and entitled Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, which proceeding was instituted by the Commission on its own motion, for the purpose, among others, of determining whether certain practices of what are referred to in said original report as Class I carriers, relating to the terminal services and affecting the operating revenues and expenses, of said carriers, were in violation of the Interstate Commerce Act; and the Commission respectfully refers the Court to the text of said reports and order for more full and complete information in the premises.

The Commision further alleges that in said proceeding the parties thereto, including the petitioner herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume

181 of testimony and other evidence bearing upon the matters covered in and by said appendixes was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioner herein, by the counsel of said parties; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and duly served upon the petitioner herein, and upon other interested parties, its said reports and order; that said reports and order included the Commission's findings of fact, decision, conclusions, orders, and requirements in the premises, and that, upon the evi-

dence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their
182 respective counsel, including matters covered by the allegations of the petition herein.

The Commission further alleges that said order of September 12, 1935, was not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said petition.

Further and more particularly answering paragraph XII of the petition, the Commission denies each of and all the allegations therein contained.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said original report of May 14, 1935, and in said Forty-third Supplemental Report and Order of September 12, 1935, which reports and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON, *Chief Counsel.*

183 [*Duly sworn to by Frank McManamy; jurat omitted in printing.*]

[File endorsement omitted.]

184 Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached and more *more* particularly hereinafter described are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Pennsylvania Railroad Company Local Freight Tariff AA-I. C. C. No. 2126, said schedule having been filed August 12, 1927. Supplement No. 1 to said AA-I. C. C. No. 2126, filed July 17, 1935.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 29th day of July A. D. 1935.

[SEAL] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

185 No supplement to this tariff will be issued except for the purpose of cancelling the tariff. AA—I. C. C. No. 2126. C. and C.—P. S. C.—Pa.—No. 1528. Reduction.

The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East) West Jersey and Seashore Railroad Company

Local Freight Tariff

Terminal allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company.

On all carload revenue shipments of Coal and Coke, destined to or coming from the Plant of the Pittsburgh Plate Glass Company, Ford City, Pa., on which the latter Company performs the terminal switching service for account of The Pennsylvania Railroad Company, the Pittsburgh Plate Glass Company will be allowed, out of the current Ford City, Pa., rate, 65 cents per car.

The foregoing arrangement does not include traffic on which the rate is less than 50 cents per ton, net or gross as rated.

Issued in compliance with order of the Interstate Commerce Commission, in Docket No. 10806.

Issued August 12, 1927, by G. R. Richardson, Chief of Tariff Bureau, Philadelphia, Pa. Effective September 14, 1927. Walter Thayer, Coal Traffic Manager, Philadelphia, Pa. C. H. Lippincott, Coal Freight Agent, Philadelphia, Pa. J. T. Carbine, Coal Traffic Manager, Pittsburgh, Pa. S. A. Latimer, Coal Freight Agent, Pittsburgh, Pa.

Agent's Index No. 41. (200.) Received: Month; day; year.

186 Supplement 1 to AA—I. C. C. 2126. C. and C.—P. S. C.—Pa. 1528.

The Pennsylvania Railroad Company

Cancellation Notice

AA—I. C. C. 2126. C. and C.—P. S. C.—Pa. 1528

Local Freight Tariff

Terminal allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company, is hereby canceled.

Terminal Allowances Discontinued

Issued July 17, 1935, by: G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. Effective August 22, 1935, in compliance with Seventeenth Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104 Part 2, June 25, 1935. J. T. Carbine, Coal Traffic Manager, Philadelphia, Pa. C. H. Lippincott, General Coal Freight Agent, Philadelphia, Pa. A. S. Jennings, General Coal Freight Agent, Pittsburgh, Pa. C. L. Eberly, Coal Freight Agent, Philadelphia, Pa. H. H. Lippold, Coal Freight Agent, Pittsburgh, Pa.

Agent's Index 41. (100.) Received: Month; day; year. (The end.)

187 Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certifiy that the schedules hereto attached and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Pennsylvania Railroad Company Local Freight Tariff, G. O.—I. C. C. No. 14673, said schedule having been filed August 13, 1927. Supplement No. 1 to said I. C. C. No. 14673, filed July 18, 1935.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 27th day of July A. D. 1935.

[SEAL] GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

188 No supplement to this tariff will be issued except for the purpose of cancelling the tariff. G. O.—I. C. C. No. 14673. G. O.-P. S. C.-Pa.-No. 5005. Reduction.

The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East) West Jersey and Seashore Railroad Company

Local Freight Tariff

Terminal allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company.

On all carload revenue shipments, also on cars containing 12,000 pounds or more of less carload revenue freight destined to or coming from the plant of the Pittsburgh Plate Glass Company, Ford City, Pa., on which the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company, the Pittsburgh Plate Glass Company will be allowed, out of the current Ford City, Pa., rate, 65 cents per car.

When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first

car. The maximum allowance for each additional car in the series or lot will be fifty (50) per cent. of the maximum for the first car.

On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.—O. C. No. 48, P. S. C.—Pa.—O. C. No. 48 (D. T. Lawrence, Agent), supplements thereto or reissues thereof, the maximum allowance will be fifty (50) per cent. of the maximum allowed on the first car.

The foregoing arrangement does not include traffic handled under switching charges as named in G. O.—I. C. C. No. 14296, G. O.—P. S. C.—Pa.—No. 4798 (Agent's Index No. 54), supplements thereto or reissues thereof; nor on shipments of Slag, Ashes, or other refuse material for wasting, as named in Agent B. T. Jones' I. C. C. No. 1695, P. S. C.—Pa.—No. 97, supplements thereto or reissues thereof.

Will not apply on coal or on coke (the product of coal) or on ex-lake iron ore.

Issued in compliance with order of the Interstate Commerce Commission in Docket No. 10806.

Issued August 12, 1927. Effective September 14, 1927. W. C. Glynn, Freight Traffic Manager, Pittsburgh, Pa. Issued by G. R. Richardson, Chief of Tariff Bureau, Philadelphia, Pa.

(G. O. 2069.) (R. F. 923-81.) Agent's Index No. 41. (200.)

Received: Month; day; year.

189 Supplement 1 to G. O.—I. C. C. 14673. G. O.-P. S. C.-Pa. 5005. Cancels G. O.—I. C. C. 14673. G. O.-P. S. C.-Pa. 5005.

Cancellation Notice, Tariff 1340

The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East)

Local Freight Tariff

Terminal allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached by the Pennsylvania Railroad Company is hereby cancelled.

Allowance Discontinued

Issued in compliance with Seventeenth Supplemental Report and Order of the Interstate Commerce Commission in Ex-Parte 104, Part 2, decided June 25, 1935.

Issued July 19, 1935. Effective August 22, 1935. By: H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. (C-8554.)

Agent's Index 41. 9536-B. (200.) Received. (Box 202.) (The end.)

3110 Eq. D. Filed July 31, 1935. G. H. Berger, Clerk.

190 Ex. #30. Sept. 12, 1935. Exception noted. Gibson, D. J.

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Pennsylvania Railroad Company Local Freight Tariff, AA—I. C. C. No. 2135; said schedule having been filed on December 7, 1927. Supplement No. 1 to said AA—I. C. C. No. 2135, filed August 13, 1935.

The Pennsylvania Railroad Company Local Freight Tariff, G. O.—I. C. C. No. 14725; said schedule having been filed on December 7, 1927. Supplement No. 1 to said G. O.—I. C. C. No. 14745, filed August 15, 1935.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 9th day of September A. D. 1935.

[SEAL] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

191 No supplement to this tariff will be issued except for the purpose of cancelling the tariff. AA.—I. C. C. No. 2135, Cancels AA.—I. C. C. No. 2132. C. and C.-P. S. C.-Pa.-No. 1537, Cancels C. and C.-P. S. C.-Pa.-No. 1532. Change.

The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East), West Jersey and Seashore Railroad Company

Local Freight Tariff

Terminal allowances to West Leechburg Steel Company at West Leechburg, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company.

On all carload revenue shipments of Coal and Coke (the direct products of Coal), destined to or coming from the Plant of the West Leechburg Steel Company, the latter Company performs the terminal switching service for account of The Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

For such terminal service performed for The Pennsylvania Railroad Company by the West Leechburg Steel Company, the latter will be allowed one dollar and twenty-eight cents ($1.28) per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period June 21st to July 2nd, 1927, inclusive, and filed with the Interstate Commerce Commission.

The foregoing arrangement does not include traffic on which the rate is less than 50 cents per ton, net or gross, as rated.

Issued December 6, 1927, by G. R. Richardson, Chief of Tariff Bureau, Philadelphia, Pa. Effective January 12, 1928. Walter Thayer, Coal Traffic Manager, Philadelphia, Pa. C. H. Lippincott, Coal Freight Agent, Philadelphia, Pa. W. R. Cox, Coal Traffic Manager, Pittsburgh, Pa. S. A. Latimer, Coal Freight Agent, Pittsburgh, Pa.

Agent's Index No. 41. (200.) Received: Month; day; year.

192 Supplement 1 to A. A.—I. C. C. 2135. C. and C.—P. S. C.—Pa. 1537.

The Pennsylvania Railroad Company

Cancellation Notice

A. A.—I. C. C. 2135. C. and C.—P. S. C.—Pa. 1537

Local Freight Tariff

Terminal allowances to West Leechburg Steel Company at West Leechburg, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company is hereby canceled.

Terminal Allowances Discontinued

Issued August 13, 1935, by G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. Effective September 16, 1935, in compliance with Thirty-Fifth Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104, Part 2, July 29, 1935. J. T. Carbine, Coal Traffic Manager, Philadelphia, Pa. C. H. Lippincott, General Coal Freight Agent, Philadelphia, Pa. A. S. Jennings, General Coal Freight Agent, Pittsburgh, Pa. C. L. Eberly, Coal Freight Agent, Philadelphia, Pa. H. H. Lippold, Coal Freight Agent, Pittsburgh, Pa.

Agent's index 41. (100.) Received: Month; day; year. (The end.)

193 No supplement to this tariff will be issued except for the purpose of canceling the tariff. G. O.—I. C. C. No. 14745, cancels G. O.—I. C. C. No. 14722 (Agent's Index No 41). G. O.—P. S. C.—Pa.—No. 5054, cancels G. O.—P. S. C.—Pa.—No. 5037.

The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East), West Jersey and Seashore Railroad Company

Local Freight Tariff

Terminal allowances to West Leechburg Steel Company at West Leechburg, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company.

On all carload revenue shipments, also on cars containing 12,000 pounds or more of less-carload reveneue freight, destined to or coming from the plant of the West Leechburg Steel Company, the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

For such terminal service performed for the Pennsylvania Railroad Company by the West Leechburg Steel Company, the latter will be allowed one dollar and twenty-eight cents ($1.28) per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period June 21st to July 2nd, 1927, inclusive, and filed with the Interstate Commerce Commission.

When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car, the maximum allowance for each additional car in the series or lot will be fifty (50) percent of the maximum for the first car.

On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.—O. C. No. 49, P. S. C.—Pa.—O. C. No. 49 (D. T. Lawrence, Agent), supplements thereto or reissues thereof, the maximum allowance will be fifty (50) percent of the maximum allowed on the first car.

The foregoing arrangement does not include traffic handled under switching charges as named in Pennsylvania Railroad Tariff G. O.—I. C. C. No. 14296, G. O.—P. S. C.—Pa.—No. 4798 (Agent's Index No. 54), supplements thereto or reissues thereof; nor on shipments of slag, ashes, or other refuse material for wasting, as named in Agent B. T. Jones' I. C. C. No. 1695, P. S. C.—Pa.—No. 96, supplements thereto or reissues thereof.

Will not apply on coal or on coke (the product of coal) or on ex-lake iron ore.

Issued December 5, 1927. Effective January 12, 1928. H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. Issued by G. R. Richardson, Chief of Tariff Bureau, Philadelphia, Pa.

(G. O. 2152.) (File R. F. 923-79—R. F. 946-22.) Agent's Index No. 41. (400.) Received: Month; day; year.

194 Supplement I to G. O.—I. C. C. 14745. G. O.—P. S. C.—Pa. 5054. Cancels G. O.—I. C. C. 14745. G. O.—P. S. C.—Pa. 5054.

Cancellation Notice, Tariff 1385

The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East)

Local Freight Tariff

Terminal allowances to West Leechburg Steel Company at West Leechburg, Pa., on Traffic to and from Points on or reached via the Pennsylvania Railroad is hereby cancelled.

Allowance Discontinued

Issued in Compliance with Thirty-fifth Supplemental Report and Order of the Interstate Commerce Commission in Ex-Parte 104, Part 2, Decided July 29, 1935.

Issued August 13, 1935. Effective September 16, 1935. By H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa.

(C–8627.) Agent's Index 41. 9710–c. (300.) Received. (Box 202.) (The end.)

No. 3130 Eq. D. Filed Sept. 12, 1935. G. H. Berger, Clerk.

195 Interstate Commerce Commission, Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached, and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Pennsylvania Railroad Company, Local Freight Tariff, I. C. C. No. 139, said schedule having been filed July 10, 1929. Supplement No. 1 to said I. C. C. No. 139, filed July 18, 1935.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 27th day of July A. D. 1935.

[SEAL] GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

196 No supplement to this tariff will be issued except for the purpose of canceling the tariff unless otherwise specifically authorized by the Commission. I. C. C. 139, W. Va. 14.

The Pennsylvania Railroad Company

Local Freight Tariff

Terminal allowances to Weirton Steel Company at Weirton, W. Va., on traffic to and from points on or reached via the Pennsylvania Railroad Company.

Stamp here. Date received.

On all carload revenue shipments, also on cars containing 10,000 pounds or more of less-carload revenue freight, destined to or coming from the plant of the Weirton Steel Company, the latter company performs the terminal switching service for account of The Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

For such terminal service performed for The Pennsylvania Railroad Company by the Weirton Steel Company, the latter will be allowed one dollar and twenty-three cents ($1.23) per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period February 6 to February 12, 1929, inclusive, and filed with the Interstate Commerce Commission.

When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car, the maximum allowance for each additional car in the series or lot will be sixty-two cents ($0.62), or fifty (50) per cent of the maximum for the first car.

On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.—O. C. No. 49, P. S. C.—W. Va.—O. C. No. 49 (D. T. Lawrence, Agent), supplements to or successive issues of said publication, the maximum allowance will be sixty-two cents ($0.62) or fifty (50) per cent of the maximum allowed on the first car.

The foregoing allowances will not be made on Ex-Lake Iron Ore, nor on traffic handled under local transportation charges as named in Pennsylvania Railroad Company Tariff 134–A, I. C. C. F–2025 (P. S. C.—W. Va. F–65) (Tariff File C–54), nor on shipments of Slag, Ashes, or other refuse material for wasting, as named in Agent B. T. Jones' Tariff I. C. C. 1695 (W. Va. 90) (Penna. Tariff File C–105), supplements to or successive issues of said publication.

Issued July 10, 1929. Effective August 15, 1929. By G. R. Richardson, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. W. R. Cox, Freight Traffic Manager, Pittsburgh, Pa. S. A. Latimer, Coal Traffic Manager, Pittsburgh, Pa. J. B. McCorkle, General Coal Freight Agent, Philadelphia, Pa.

(G. O. 2969.) File Inf. Cir. 9102-M-835. (T–300.) (The end.) Tariff File C–54.

197 Supplement 1 to I. C. C. 139, W. Va. 14. Cancels I. C. C. 139, W. Va. 14.

Cancellation Notice, Tariff 413

The Pennsylvania Railroad Company

Local Freight Tariff

Terminal allowances to Weirton Steel Company at Weirton, W. Va., on traffic to and from points on or received via the Pennsylvania Railroad Company is hereby cancelled.

Allowance Discontinued

Issued in compliance with Fifteenth Supplemental Report and Order of the Interstate Commerce Commission in Ex Parte No. 104, Part 2, decided June 24, 1935.

Issued July 17, 1935. Effective August 22, 1935. By H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. J. T. Carbine, Coal Traffic Manager, Philadelphia, Pa. A. S. Jennings, General Coal Freight Agent, Pittsburgh, Pa. H. H. Lippold, Coal Freight Agent, Pittsburgh, Pa.

(C–8555). Agent's Index 41. 9535–d. (300.) Received. (Box 202.) (The end.) C–54.

3110 Eq. D. Filed July 31, 1935. G. H. Berger, Clerk.

198 Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Pennsylvania Railroad Company Local Freight Tariff AA-I. C. C. No. 2212, said schedule having been filed June 11, 1930. Supplement No. 1 to said AA–I. C. C. No. 2212, filed June 27, 1935.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 29th day of July A. D. 1935.

[SEAL] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

199 No supplement to this tariff will be issued except for the purpose of cancelling the tariff unless otherwise specifically authorized by the Commission. AA—I. C. C. 2212. C. and C.—P. S. C.—PA. 1624. (Reduction.)

The Pennsylvania Railroad Company

Local Freight Tariff

Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company.

On all carload revenue shipments of Coal and Coke (the direct products of Coal) destined to or coming from the plant of the Allegheny Steel Company, the latter Company performs the terminal switching service for account of The Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this Company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

For such terminal service performed for The Pennsylvania Railroad Company by the Allegheny Steel Company, the latter will be allowed one dollar and seven cents ($1.07) per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period February 26th to March 7th, 1930, inclusive, and filed with the Interstate Commerce Commission.

The foregoing arrangement does not include traffic on which the rates is less than 50 cents per ton, net or gross, as rated.

Issued June 10, 1930. Effective July 15, 1930. By G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. Walter Thayer, Coal Traffic Manager, Philadelphia, Pa. J. B. McCorkle, Coal Traffic Manager, Pittsburgh, Pa. C. H. Lippincott, Coal Freight Agent, Philadelphia, Pa. A. S. Jennings, Coal Freight Agent, Pittsburgh, Pa.

Agent's index 41. (200.) Received: Month; day; year. (The end.)

200 Supplement 1 to AA—I. C. C. 2212. C. and C.—P. S. C.—PA. 1624.

The Pennsylvania Railroad Company

Cancellation Notice

AA—I. C. C. 2212. C. and C.—P. S. C.—PA. 1624

Local Freight Tariff

Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via The Pennsylvania Railroad Company is hereby canceled.

Terminal Allowances Discontinued

Issued July 27, 1935. Effective August 1, 1935. By G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. In compliance with Eleventh Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104, Part 2, June 7, 1935. J. T. Carbine, Coal Traffic Manager, Philadelphia, Pa. C. H. Lippincott, General Coal Freight Agent, Philadelphia, Pa. A. S. Jennings, General Coal Freight Agent, Pittsburgh, Pa. C. L. Eberly, Coal Freight Agent, Philadelphia, Pa. H. H. Lippold, Coal Freight Agent, Pittsburgh, Pa.

Agent's index 41. (100.) Received: Month; day; year. (The end.)

3110 Eq. D. Filed July 31, 1935. G. H. Berger, Clerk.

201 Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached and more particularly hereinafter described are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Pennsylvania Railroad Company Local Freight Tariff, I. C. C. No. 1132, said schedule having been filed January 16, 1934. Supplement No. 1 to said I. C. C. No. 1132, filed July 2, 1935.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 27th day of July A. D. 1935.

[SEAL] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

202 No supplement to this tariff will be issued except for the purpose of cancelling the tariff unless otherwise specifically authorized by the Commission. I. C. C. 1132, Cancels I. C. C. 340. (Agent's Index 41.) P. S. C.-Pa. 572, Cancels P. S. C.-Pa. 228. Tariff 487A.

The Pennsylvania Railroad Company

Local Freight Tariff

Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company:

On all carload revenue shipments, also on cars containing 6,000[1] pounds or more of less carload revenue freight, destined to or coming from the plant of the Allegheny Steel Company, the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company. Such terminal switching service,

[1] Reduction.

for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

For such terminal service performed for the Pennsylvania Railroad Company by the Allegheny Steel Company, the latter will be allowed One Dollar and Seven Cents ($1.07) per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period February 26 to March 7, 1930, inclusive.

When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car, the allowance for each additional car in the series or lot will be fifty-four (54) cents.

On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.–O. C. 52, P. S. C.–Pa.–O. C. 52 (A. H. Greenly, Agent), supplements thereto or successive issues thereof, the allowance will be fifty-four (54) cents or fifty (50) percent of the allowance for the first car.

The foregoing arrangement does not apply on the following:

(a) On Coal or Coke (the product of coal), or Ex-Lake Iron Ore.

(b) On traffic handled under switching charge provided for in Pennsylvania Railroad Company Tariff I. C. C. 691, P. S. C.–Pa. 384 (Agent's Index 54), supplements thereto or successive issues thereof.

(c) On Slag, Ashes, or other Refuse Material for Wasting, as provided for in Agent B. T. Jones' Tariff I. C. C. 1695, P. S. C.–Pa. 97, supplements thereto or successive issues thereof.

(d)[1] On Manufactured Iron and Steel Articles rated fifty (50) cents or less per ton as provided for in Pennsylvania Railroad Company Tariff, P. S. C.–Pa. 567 (Agent's Index 41), supplements thereto or successive issues thereof.

Issued January 12, 1934 Effective February 19, 1934. By H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa.

(C–6881.) (Agent's Index 41. 6419–b. (300.) Received: Month; day; year. (Box 202.) (The end.)

203 Supplement 1 to I. C. C. 1132 P. S. C.—Pa. 572. Cancels I. C. C. 1132 P. S. C.—Pa. 572.

Cancellation Notice, Tariff 487–A

The Pennsylvania Railroad Company

Local Freight Tariff

Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via The Pennsylvania Railroad Company is hereby canceled.

[1] Pennsylvania Intrastate application only.

Allowance Discontinued

Issued in compliance with Eleventh Supplemental Report and Order of the Interstate Commerce Commission in Ex Parte No. 104, Part 2, decided June 7, 1935.

Issued June 29, 1935. Effective August 1, 1935. By H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa.

(C-8513.) Agent's Index 41. 9414-. (300.) Received: Month; day; year. (Box 202.) (The end.)

3110 Eq. D. Filed July 31, 1935. G. H. Berger, Clerk.

204 Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to wit:

The Pennsylvania Railroad Company, Tariff 506-B, Local Freight Tariff, I. C. C. No. 1170, said schedule having been filed February 19, 1934. Supplement No. 1 to said I. C. C. No. 1170, filed July 18, 1935.

Pennsylvania Railroad Company, Local Freight Tariff, AA-I. C. C. No. 879, said schedule having been filed May 1, 1917. Supplement No. 1 to said AA-I. C. C. No. 879, filed July 18, 1935.

The stamp additions, encircled in red, appearing on the copies hereto attached are expressly excluded from this certification, as no such additions appear on the originals so filed.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 25th day of July, A. D., 1935.

[SEAL] _____.

Secretary of the Interstate Commerce Commission.

205 No supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission. I. C. C. 1170, P. S. C.-Pa. 592. Cancels I. C. C. 990, P. S. C.-Pa. 513 (Agent's Index 41). Tariff 506-B.

The Pennsylvania Railroad Company

Local Freight Tariff

Terminal allowances to American Sheet & Tin Plate Company at Vandergrift, Pa., on Traffic to and from Points on or reached via the Pennsylvania Railroad.

On all carload revenue shipments, also on cars containing 6,000 pounds or more of less carload freight destined to or coming from plant of the American Sheet & Tin Plate Company, the latter Com-

pany performs the terminal switching service for account of the Pennsylvania Railroad Company.

The American Sheet & Tin Plate Company will be allowed for such service, out of the current Vandergrift, Pa., rate, the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet & Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding $1.10 per car.

When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car. The allowance for each additional car in the series or lot will be fifty-five (55) cents or fifty (50) percent of the allowance for the first car, except that in instances where cars are loaded to their full or safe carrying capacity, the per car allowance of $1.10 will be made for each car.

On cars containing excess shipments of carload freight handled under Rule 24 of the Official Classification, I. C. C.-O. C. 52, P. S. C.-Pa.-O. C. 52 (A. H. Greenly, Agent), supplements thereto or successive issues thereof, the allowance will be fifty-five (55) cents or fifty (50) percent of the allowance for the first car.

The foregoing arrangement does not include traffic handled under switching charges named in Pennsylvania Railroad Tariff I. C. C. 691, P. S. C.-Pa. 384, supplements thereto or successive issues thereof; nor on traffic handled under Pennsylvania Railroad Local Freight Tariff P. S. C.-Pa. 290 (Agent's Index 88) or successive issues thereof; nor on shipments of Slag, Ashes or Other Refuse Material for Wasting, as named in Agent B. T. Jones' Tariff 226-B, I. C. C. 1695, P. S. C.-Pa. 97, supplements thereto or successive issues thereof.

Will not apply on coal or on coke (the product of coal) or on ex-lake iron ore.

Issued February 20, 1934. Effective March 25, 1934. By H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa.

(C-7042.) Agent's Index 41. 6598-c. (300.) Received: Month; day; year. (Box 202.) (The End.)

206 Supplement 1 to I. C. C. 1170, P. S. C.-Pa. 592. Cancels I. C. C. 1170, P. S. C.-Pa. 592.

Cancellation Notice, Tariff 506-B.

The Pennsylvania Railroad Company

Local Freight Tariff

Terminal allowances to American Sheet & Tin Plate Company at Vandergrift, Pa., on traffic to and from points on or reached via The Pennsylvania Railroad is hereby cancelled.

Allowance Discontinued

Issued in compliance with Eighteenth Supplemental Report and Order of the Interstate Commerce Commission in ex-parte 104, Part 2, decided July 5, 1935.

Issued July 18, 1935. Effective August 22, 1935. By H. C. Oliver, Freight Traffic Manager, Pittsburgh, Pa. G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa.

(C–8553.) Agent's Index 41. 9537–B. (300.) Received. (Box 202.) (The End.)

207 No supplement to this tariff will be issued except for the purpose of cancelling the tariff. AA–I. C. C. No. 879, Superseding AA–I. C. C. No. 770. C. and C.–P. S. C.–Pa.–No. 620, Superseding C. and C.–P. S. C.–Pa.–No. 422.

Pennsylvania Railroad Company (Philadelphia, Baltimore & Washington Railroad Company), West Jersey & Seashore Railroad Company

Local Freight Tariff

Terminal allowances to American Sheet and Tin Plate Company at Vandergrift, Pa., applying on coal and coke traffic to and from points on or reached via the Pennsylvania Railroad Company.

On all carload revenue shipments, destined to or coming from the plant of the American Sheet and Tin Plate Company, the latter company performs the terminal switching service for account of the Pennsylvania Railroad Company.

The American Sheet and Tin Plate Company will be allowed for such service, out of the current Vandergrift, Pa., rate the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet and Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding $1.10[1] per car.

The foregoing arrangement does not include traffic handled under switching charges as named in Tariff C. and C.–P. S. C.–Pa.–No. 426, applicable on Bituminous and Cannel Coal, or reissues thereof.

Issued April 28, 1917, by H. C. Clevenger, Coal Freight Agent, Philadelphia, Pa. R. H. Large, Coal Traffic Manager, Philadelphia, Pa. Effective June 1, 1917.

Agent's Index No. 41. (100.) Received: Month; day; year.

208 Supplement 1 to AA–I. C. C. 879. C. and C.–P. S. C.–Pa. 620.

[1] Reduction.

The Pennsylvania Railroad Company

Cancellation Notice

AA–I. C. C. 879. C. and C.–P. S. C.–Pa. 620

Local Freight Tariff

Terminal allowances to American Sheet and Tin Plate Company at Vandergrift, Pa., applying on coal and coke traffic to and from points on or reached via the Pennsylvania Railroad Company is hereby canceled.

Terminal Allowances Discontinued

Issued July 17, 1935. Effective August 22, 1935. In compliance with Eighteenth Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104, Part 2, July 5, 1935. By G. P. Shaw, Chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. J. T. Carbine, Coal Traffic Manager, Philadelphia, Pa. C. H. Lippincott, General Coal Freight Agent, Philadelphia, Pa. A. S. Jennings, General Coal Freight Agent, Pittsburgh, Pa. C. L. Eberly, Coal Freight Agent, Philadelphia, Pa. H. H. Lippold, Coal Freight Agent, Pittsburgh, Pa.

Agent's Index 41. Req. 3547. (100.) Received: Month; day; year. (The end.)

209 Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of notice of assignment for hearings, dated September 30, 1932, in Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 19th day of October, A. D. 1935.

[SEAL] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

Filed Oct. 22, 1935. G. H. Berger, Clerk.

210 INTERSTATE COMMERCE COMMISSION,
Washington, D. C., September 30, 1932.

Docket Ex-Parte No. 104, Part II, Terminal Services

Notice of Assignment for Hearings

It appearing, among other things, either from responses made to inquiries or from the evidence thus far adduced of record, that two questions are presented concerning the terminal switching services

performed on certain industrial plant tracks in moving traffic between industries located on such tracks and the rails of respondent carriers, to-wit:

1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform. This question relates to three distinct methods of rendering such services, including:

Group A, where the industries perform these services and receive compensation therefor from respondent carriers.

Group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers, and

Group C, where respondent carriers perform the services at the special convenience of the industries.

2. Whether, in circumstances where such services are performed by the industries, any allowances made to the industries by connecting common carriers as compensation for such services, are lawful; also why, in similar circumstances, no allowances are made to other industries for performing such services.

211 It appearing further, that in the determination of these questions the individual industries and respondent carriers are entitled to a full hearing; now, therefore, for the purpose of affording all interested parties an opportunity to be heard, the above-entitled proceeding is assigned for further hearing before Director W. P. Bartel, or Examiner C. M. Bardwell, at the Chamber of Commerce Rooms, Pittsburgh, Pa., at 10:00 o'clock a. m., on the dates hereinafter named. In reference to each industry and respondent carrier so specified—(the respondents being identified by using customary and well known abbreviations of their names, under the caption "Railroad Connections")—it is requested that, by its authorized representatives, it attend the assigned hearing, according as their respective interests may appear, and have available their witnesses, who, from their knowledge of the operations on the industrial plant tracks which serve their respective industries, can testify to physical facts relating to the performance of the described services, the basis and justification for any allowances or compensation which may be received by such industries from the respondent carriers for such services, and to any other or further facts that may have a material bearing in the determination of the two questions herein set forth.

If, in reference to any of the named industries or respondent carriers, information of a more particular or special nature is deemed essential, or if the presence of particular witnesses is desired, a special notice of such particulars will be served.

These assignments have been arranged in a manner calculated to meet, as far as practicable, the conveniences of all interested parties. It is quite probable that some changes will be sought toward that end, and, so far as requests are kept within the range of assigned dates and at Pittsburgh, or at New York, N. Y., where a subsequent hearing will be assigned, they will be given due consideration.

Any inquiries in reference to this proceeding, and the assigned hearings, should be addressed to W. P. Bartel, Director, Bureau of Service, Washington, D. C.

The industries and carriers to whom this notice is directed, and the dates on which they will be heard, are as follows, to-wit:

212 For Hearing at Pittsburgh

October 21, 1932

No.	Industry	Location and address	Railroad connections
616 (a)	J. M. Huber Pigment Co., Inc.	Kaolin mines near Graniteville and Langley, S. C. Address: J. M. Huber Pigment Co., Inc., 460 West 34th St., New York, N. Y.	Sou.
142	National Tube Co.	Christy Park, Pa.[1]	B. & O.
143	National Tube Co.	Versailles, Pa.[1]	B. & O.
145	National Tube Co. (Penn Works) (Continental Works)	Pittsburgh, Pa.[1]	B. & O., Monongahela Connecting
25	Blackwood Coal & Coke Co.	Bundy, Va. Address: Johnson's Mill, Va.	Sou.
530	Atlantic Steel Co.	Atlanta, Ga.	Sou.
1077 (a)	National Tube Co.	Lorraine, Ohio.	Lake Term.
1057	Jones & Laughlin Steel Corp.	Pittsburgh, Pa.	Monongahela Connecting.

[1] Address: National Tube Co., Frick Bldg., Pittsburgh, Pa.

October 22, 1932

1007 (a)	Bethlehem Mines Corp.	Johnstown, Pa.	C. & B. L.
1007 (b)	Bethlehem Steel Co.	Johnstown, Pa.	C. & B. L.
544 (a)	Cambria Steel Co.	Johnstown, Pa.	P. R. R., B. & O.

October 24, 1932

1055	Kelley-Springfield Tire Co.	Cumberland, Md.	B. & O.
603	Gem Mfg. Co.	Bascom, Ohio.	B. & O.
676	Pittsburgh Forge & Iron Co.	Allegheny (Pittsburgh), Pa.	B. & O.
213			
683	Ralston Steel Car Co.	Columbus, Ohio. Address: 3500 E. 5th Ave.	B. & O.
691	Rolfe Tannery Co. (Kistler Leather Co.).	Johnsonburg, Pa.	B., R. & P. (B. & O.)
1043 (a)	General Chemical Co.	Cleveland, Ohio.	B. & O.
682	Punxsutawney Furnace Co.	Punxsutawney, Pa.	B., R. & P. (B. & O.)
1004 (c)	American Steel & Wire Co.	Cleveland, Ohio. Address: Rockefeller Bldg.	N. & S. S.
1001 (b)	Aluminum Co. of America.	Cleveland, Ohio. Address: Hanna Bldg.	N. & S. S.
582	Domestic Coke Corp.	N. Fairmont, W. Va. Address: Fairmont, W. Va.	Monongahela Ry.

October 25, 1932

590	Elk Tanning Co.	Clearfield, Pa.	B., R. & P. (B. & O.); N. Y. C.
591	Elk Tanning Co.	Curwensville, Pa.	B., R. & P. (B. & O.)
592	Elk Tanning Co.	Ridgway, Pa.	B., R. & P. (B. & O.)
1055	Lehigh Portland Cement Co.	New Castle, Pa.	B., R. & P. (B. & O.)
670	Custer City Chemical Co.	DeGolia, Pa.	B., R. & P. (B. & O.)
800	Adrian Furnace Co.	DuBois, Pa.	B., R. & P. (B. & O.)
542	Buffalo Slag Co.	DuBois, Pa.	B., R. & P. (B. & O.)
542 (a)	Buffalo Slag Co.	Josephine, Pa.	B., R. & P. (B. & O.)
1124	N. & G. Taylor Co. Inc.	Cumberland, Md.	B. & O., W. M.
718	Standard Steel Car Co.	New Castle, Pa.	B., R. & P. (B. & O.)
717	Standard Steel Car Co.	Butler, Pa.	B. & L. E.

214 *October 26, 1932*

No.	Industry	Location and address	Railroad connections
1132	West Virginia Pulp & Paper Co.	Luke, Md.	B. & O.; W. M.
735	West Penn Power Co.	Connellsville, Pa.	W. M.
679	Potomac Edison Co.	Williamsport, Md.	W. M.
640	Medusa Portland Cement Co.	York, Pa.	W. M.
671	Parsons Tanning Co.	Parsons, W. Va.	W. M.
598	Frick Co.	Waynesboro, Pa.	W. M.
632	Landis Tool Co.	Waynesboro, Pa.	W. M.
630	Kistler Lea[illegible]r Co.	Elkins, W. Va.	W. M.
629	Keystone N[illegible] Co.	Elkins, W. Va.	W. M.
602	Geiser Mfg. [illegible]	Waynesboro, Pa.	W. M.
548	Chambersburg Engineering Co.	Chambersburg, Pa.	W. M.

October 27, 1932

180	Spang-Chalfont Co.	Etna (Pittsburgh), Pa.	B. R. & P. (B. & O.); B. & O.; P. R. R.; P. & L. E.
181	Spang-Chalfont Co.	Economy, Pa. Address: Ambridge, Pa.	P. R. R.
201	United Engineering & Foundry Co.	Canton, Ohio.	B. & O.; W. & L. E.; P. R. R.
202	United Engineering & Foundry Co.	Vandergrift, Pa.	P. R. R.
141	National Tube Co.	Elwood City, Pa.	B. R. & P. (B. & O.); B. & O.; P. & L. E.
65	Dunbar Corp.	Dunbar, Pa.	B. & O.; P. R. R.
57	Crucible Steel Co. of America (Park Works).	Pittsburgh, Pa.[1]	B. & O.; P. R. R.; B. R. & P. (B. & O.).
58	Crucible Steel Co. of America (Crescent Works).	Pittsburgh, Pa.[1]	P. R. R.

[1] Address: Crucible Steel Co. of America, Oliver Bldg., Pittsburgh, Pa.

215 *October 28, 1932*

4	Allegheny Steel Co.	Brackenridge, Pa.	P. R. R.
20	Apollo Steel Co.	Apollo, Pa.	P. R. R.
68	Edgewater Steel Co.	Verona, Pa.	P. R. R.
78	Glen-White Coal-Lumber Co.	Gallitzin, Pa.	P. R. R.
125	McClintock-Marshall Co.	Leetsdale, Pa.	P. R. R.
161	Pittsburgh Steel Products Co.	Allenport, Pa.	P. R. R.
186	Standard Tin Plate Co.	Canonsburg, Pa.	P. R. R.

October 29, 1932

216	West Leechburg Steel Co.	West Leechburg, Pa. Address: Leechburg, Pa.	P. R. R.
223	Weirton Steel Co.	Weirton, W. Va.	P. R. R.
1130(a)	Weirton Steel Co.	Steubenville, O.	W. & L. E.; P. R. R.
112	Koppel Industrial Car & Equipment Co. (Beaver Connecting R. R.).	Koppel, Pa.	P. R. R.; P. & L. E.

October 31, 1932

199	Timkin Roller Bearing Co.	Canton, O.	W. & L. E.; P. R. R.
250	Youngstown Sheet & Tube Co.	Zanesville, O.	W. & L. E.; P. R. R.; N. Y. C.
1136	Youngstown Sheet & Tube Co.	Struthers, O.	P. R. R.; P. & L. E.
1136(a)	Youngstown Sheet & Tube Co. (Brier Hill Plant.)	Youngstown, O.	Erie.
1136(b)	Youngstown Sheet & Tube Co. (Campbell Works.)	Youngstown, O.	P. & L. E.
516	American Encaustic & Tiling Co.	Zanesville, O.	W. & L. E.
543	Canton Car Corp.	Canton, O.	W. & L. E.
666	Ohio Building Material Co.	Cleveland, O. Address: 1276 W. 3rd.	W. & L. E.
612	Griscom-Russell Co.	Massillon, O.	W. & L. E.
612(a)	Griscom-Russell Co.	Zanesville, O.	W. & L. E.

216 *November 1, 1932*

No.	Industry	Location and address	Railroad connections
157	Pittsburgh Plate Glass Co	Ford City, Pa	P. R. R.
158	Pittsburgh Plate Glass Co	Fultonham, O. Address: South Zanesville, O.	P. R. R.; N. Y. C.
188	Struthers Iron & Steel Co	Struthers, O	P. R. R.; P. & L. E.
1122 (a)	Struthers Furnace	Struthers, Pa. Address: Warren, Pa.	P. & L. E.
204	United States Gypsum Co. (Culver & Port Clinton R. R.)	Gypsum, O	N. Y. C.
555	Colonial Steel Co	Colona, Pa. Address: Monaca, Pa.	P. & L. E.
33	Cannelton Coal & Coke Co	Cannelton, W. Va	N. Y. C.
102	Kanawha Valley Water Co	Nitro, W. Va	N. Y. C.
104	Kelley Island Lime & Transport Co.	Martin, O	N. Y. C.

November 2, 1932

12	American Sheet & Tin Plate Co. (Scottdale & Old Meadow Works)	Scottdale, Pa	B. & O.; P. R. R.
13	American Sheet & Tin Plate Co.	Vandergrift, Pa	P. R. R.
14	American Sheet & Tin Plate Co.	Wellsville, O	P. R. R.
1004	American Sheet & Tin Plate Co.	Farrell, Pa	P. R. R.; N. Y. C.; Erie; P. & L. E.
1004 (b)	American Sheet & Tin Plate Co. (Shenango Works)	New Castle, Pa	P. R. R.; P. & L. E.; Erie; B. & O.
1004 (e)	American Sheet & Tin Plate Co.	Canton, O	W. & L. E.
1004 (f)	American Sheet & Tin Plate Co.	Monessen, Pa	P. & L. E.
154	Page Steel & Wire Co	Monessen, Pa	P. & L. E.
1101	Republic Steel Corporation	All plants at Pittsburg, Youngstown, Massillon, and Canton, Ohio. Address: 335 Market St., Youngstown, O.	P. R. R.; B. & O.; Erie; W. & L. E.

217 *November 3, 1932*

1001 (c)	American Bridge Co	Pittsburgh, Pa	P. R. R.
9	American Bridge Co	Toledo, O	W. & L. E.; P. R. R.; N. Y. C.
5	American Bridge Co	Ambridge, Pa	P. R. R.
6	American Bridge Co	Elmira Heights, N. Y.	D. L. & W.; Erie; L. V. P. R. R.
7	American Bridge Co	Manayunk, Pa	Reading; P. R. R.
507	American Bridge Co	Pencoyd, Pa	Reading
10	American Bridge Co	Trenton, N. J.	P. R. R.
1001 (d)	American Bridge Co	Canton, O	W. & L. E.
140	National Malleable & Steel Castings Co.	Sharon, Pa	Erie; P. R. R.; N. Y. C.; P. & L. E.

November 4, 1932

173	Sharon Steel Hoop Co	Sharon, Pa	Erie; P. R. R.; N. Y. C.; P. & L. E.
1111 (a)	Sharon Steel Hoop Co	Youngstown, O	Erie; B. & O.
1111 (b)	Sharon Steel Hoop Co	Bentley, Pa	P. & L. E.
643	Mesta Machine Co	W. Homestead, Pa. Address: Homestead, Pa.	B. & O.; P. & L. E.
1093 (a)	Pittsburgh Steel Foundry	Glassport, Pa	P. & L. E.
1112 (a)	Shenango Furnace Co	Sharpsville, Pa	Erie
1135 (a)	Youngstown Ice Co	Youngstown, O. Address: 27 East Rayen Ave.	Erie
1047 (c)	Goodrich Tire & Rubber Co	Akron, O	Erie
1125 (a)	Truscon Steel Co	Youngstown, O. Address: 1315 Albert St.	Erie
1037 (a)	Fitzsimmons Co	Youngstown, O. Address: 1623 Wilson Ave.	Erie

218 *November 5, 1932*

No.	Industry	Location and address	Railroad connections
1132 (a)	Wilkoff Company	Youngstown, O. Address: 1609 Wilson Ave.	Erie, B. & O.
1125 (b)	Union Wholesale Lumber Co.	Youngstown, O. Address: 1571 Cherry.	Erie, B. & O.
1026	Ayer-Lord Tie Plant	Carbondale, Ill.	I. C.

November 7, 1932

34	Carnegie Steel Co., McDonald Mill (Youngstown & Northern R. R.)	Youngstown, O.[1]	B. & O.; P. & L. E.; N. Y. C.; Erie.
1014	Carnegie Steel Co.	Plants at Youngstown other than McDonald Mill[1]	B. & O.; P. R. R.; P. & L. E.; Erie.
37	Carnegie Steel Co. (Lucy Furnace)	Pittsburgh, Pa.[1]	P. R. R.
38	Carnegie Steel Co. (Upper Union Mills)	Pittsburgh, Pa.[1]	P. R. R.
39	Carnegie Steel Co. (Isabella Furnace)	Sharpsburg, Pa.[1]	P. R. R.; P. & L. E.; B. & O.; B. R. & P. (B. & O.)
40	Carnegie Steel Co. (Schoen Plant)	McKees Rocks, Pa.[1]	P. & L. E.; P. & W. V.
41	Carnegie Steel Co.	Waverly, N. J.[1]	P. R. R.
546	Carnegie Steel Co.	Mingo Junction, O.[1]	W. & L. E.; P. R. R.
547	Carnegie Steel Co. (Shipley Furnace)	Etna, Pa.[1]	B. & O.
1013	Carnegie Steel Co. (Homestead Works)	Munhall, Pa.[1]	Union R. R.
1013 (a)	Carnegie Steel Co.	New Castle, Pa.[1]	P. & L. E.
36	Carnegie Steel Co.	Farrell, Pa.[1]	P. & L. E.; P. R. R.; N. Y. C.; Erie.
18	American Steel & Wire Co.	Farrell, Pa.	P. & L. E.; P. R. R.; N. Y. C.; Erie.

[1] Address: Carnegie Steel Co., Carnegie Bldg., Pittsburgh, Pa.

219 *November 8, 1932*

150	Oliver Iron & Steel Co.	Pittsburgh, Pa.	P. & W. V.; B. & O.; P. R. R.; P. & L. E.
160	Pittsburgh Steel Co.	Monessen, Pa.	P. & W. V.; P. & L. E.
521	American Shipbuilding Co.	Lorain, O.	N. Y. C. & St. L.
1068	Mennel Milling Co.	Fostoria, O.	N. Y. C. & St. L.; B. & O.
639	Marting Iron & Steel Co.	Ironton, O.	N. & W.
681	Pulaski Iron Co.	Pulaski, Va.	N. & W.
205	United States Pipe & Foundry Co.	Addyston (Cincinnati), O.	B. & O.; Big Four (N. Y. C.)
206	United States Pipe & Foundry Co.	Scottdale, Pa.	P. R. R.; B. & O.

November 9, 1932

218	Wheeling Steel Corp.	Benwood, W. Va.[1]	W. & L. E.; P. R. R.; B. & O.
219	Wheeling Steel Corp.	Martins Ferry, O.[1]	W. & L. E.; P. R. R.; B. & O.
220	Wheeling Steel Corp. (Top Furnace and Belmont Furnace).	Wheeling, W. Va.[1]	B. & O.; P. R. R.; W. & L. E.
736	Wheeling Steel Corp.	Plants at Wheeling, Steubenville, Portsmouth, Yorkville, etc., other than specified above under Nos. 218, 219 and 220.[1]	P. R. R.; W. & L. E.; N. & W.
734	Westinghouse Electric & Manufacturing Co.	Linhart, Pa.	Union R. R.
1004 (d)	American Steel & Iron Co.	Rankin, Pa.	Union R. R.
586	Duquesne Slag Products Co.	Highland, Pa. Address: Duquesne Slag Products Co., Diamond Bldg., Pittsburgh, Pa.	B. & O.
587	Duquesne Slag Products Co.	Mifflin Junction, and Reisher Mine Siding, Pa. Address: Duquesne Slag Products Co., Diamond Bldg., Pittsburgh, Pa.	Union R. R.

[1] Address: Wheeling Steel Corp., Wheeling Steel Corp. Building, Wheeling, W. Va.

November 10, 1932

No.	Industry	Location and address	Railroad connections
69	Erie City Iron Works	Erie, Pa	B. & L. E., P. R. R., N. Y. C. & St. L., N. Y. C.
543	Butler Iron & Steel Co	Butler, Pa	B. & L. E.
562	Cooper-Bessemer Co	Grove City, Pa	B. & L. E.
563	Cooper-Bessemer Corp	Mt. Vernon, O	B. & O.
520	American Rolling Mills Co	Butler, Pa	B. & L. E.
520(a)	American Rolling Mills Co	Zanesville, O	W. & L. E.
11	American Rolling Mill Co	Ashland, Ky	C. & O.
540	Buckeye Steel Castings Co	Columbus, O [1]	P. R. R., B. & O., N. & W., Big Four (N. Y. C.), C. & O.
541	Buckeye Steel Castings Co	S. Columbus, O [1]	C. & O.
99	Jeffrey Manufacturing Co	Columbus, O [1]	B. & O., N. & W., C. & O., P. R. R., N. Y. C., Big Four (N. Y. C.).
607	Glamorand Pipe & Foundry Co	Lynchburg, Va	C. & O.
638	Lynchburg Foundry Co	Lynchburg, Va	C. & O.
	By the commission:	GEORGE B. McGINTY, Secretary.	

[1] Address: Buckeye Steel Castings Co., 2211 Parsons Ave., Columbus, O.

221 In United States District Court

No. 3110 In Equity

[Title omitted.]

Motion and order of dismissal

Filed Aug. 1, 1935

And now this 1st day of August, 1935, comes American Sheet & Tin Plate Company, plaintiff in the above entitled cause, and moves your Honorable Court to dismiss its bill of complaint hereinbefore filed as to defendant Pennsylvania Railroad Company.

AMERICAN SHEET & TIN PLATE COMPANY,
By DAVID A. REED,
ROBERT L. KIRKPATRICK,
ARTHUR B. VAN BUSKIRK,
Its Solicitors

222 Order

And now this 1st day of August 1935, upon motion of counsel for American Sheet & Tin Plate Company, plaintiff in the above entitled cause, the bill of complaint heretofore filed in said cause be and hereby the same is dismissed as to defendant Pennsylvania Railroad Company.

PER CURIAM.
S.

[File endorsement omitted.]

223 In United States District Court

No. 3111 In Equity

[Title omitted.]

Order of dismissal

Filed Aug. 1, 1935

And now, this 1st day of August 1935, it appearing that petitioner and respondent The Pennsylvania Railroad have entered into a stipulation disposing of the matters herein at issue between them, and motion having been made by petitioner at the hearing herein had on July 31, 1935, for rismissal of its petition as to said respondent The Pennsylvania Railroad Company, it is

Ordered, that the petition herein be and the same is hereby dismissed as to respondent The Pennsylvania Railroad Company.

F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

224 In United States District Court

No. 3112 In Equity

[Title omitted.]

Order of dismissal

Filed Aug. 1, 1935

And now, this 1st day of August 1935, it appearing that petitioner and respondent The Pennsylvania Railroad have entered into a stipulation disposing of the matters herein at issue between them, and motion having been made by petitioner at the hearing herein had on July 31, 1935, for dismissal of its petition as to said respondent The Pennsylvania Railroad Company, it is

Ordered, that the petition herein be and the same is hereby dismissed as to respondent The Pennsylvania Railroad Company.

F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

225 In United States District Court

No 3113 In Equity

[Title omitted.]

Order of dismissal

Filed Aug. 1, 1935

And now, this 1st day of August 1935, it appearing that petitioner and respondent The Pennsylvania Railroad have entered into a stipulation disposing of the matters herein at issue between them, and motion having been made by petitioner at the hearing herein had on July 31, 1935, for dismissal of its petition as to said respondent The Pennsylvania Railroad Company, it is

Ordered, that the petition herein be and the same is hereby dismissed as to respondent The Pennsylvania Railroad Company.

F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

226 In United States District Court

No. 3130 In Equity

[Title omitted.]

Order of dismissal

Filed Sept. 12, 1935

And now, this 12th day of September 1935, it appearing that petitioner and respondent The Pennsylvania Railroad have entered into a stipulation disposing of the matters herein at issue between them, and motion having been made by petitioner at the hearing herein had on September 12, 1935, for dismissal of its petition as to said respondent The Pennsylvania Railroad Company, it is

Ordered, that the petition herein be and the same is hereby dismissed as to respondent The Pennsylvania Railroad Company.

R. M. GIBSON,
District Judge.

[File endorsement omitted.]

227 In United States District Court

No. 3110. In Equity

[Title omitted.]

Interlocutory injunction

Filed July 31, 1935

And now this 31st day of July 1935, the application of American Sheet & Tin Plate Company for interlocutory injunction in the above entitled cause having been heard by a three-judge court as in such case made and provided by the statutes after at least five days' notice of hearing given to the Interstate Commerce Commission, to the Attorney General of the United States and to the Pennsylvania Railroad Company, it is ordered, adjudged, and decreed as follows:

(1) That the enforcement, operation, and execution of order of the Interstate Commerce Commission entered July 5, 1935, in the case of Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, and directing the Pennsylvania Railroad Company to cease and desist on or before August 22, 1935, and thereafter to abstain from the granting of allowances to American Sheet & Tin Plate Company at its plant at Vandergrift, Pa., be, and hereby is, restrained and suspended until final determination of this cause.

228

J. WARREN DAVIS,
Circuit Court Judge.
R. M. GIBSON,
F. P. SCHOONMAKER,
District Judges.

PITTSBURGH, PENNSYLVANIA, *July 31, 1935.*

[File endorsement omitted.]

229 In United States District Court

In Equity. No. 3111

[Title omitted.]

Interlocutory injunction

Filed July 31, 1935

The petitioner having heretofore filed its petition praying for a permanent injunction against the United States of America and The Pennsylvania Railroad Company against the enforcement, operation, and execution of a certain report and order made and entered by the Interstate Commerce Commission, on the 7th day of June 1935, in certain proceedings known and entitled as Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, the said order being effective on the 1st day of August 1935, and praying certain other relief as set forth in the bill; and upon motion of plaintiff for such interlocutory injunction pending the final order of the court herein;

And the Honorable Frederic P. Schoonmaker, Judge of the District Court of the United States for the Western District of Pennsylvania, pursuant to Section 47 of the United States Code, having called to his assistance to hear and determine said application for said interlocutory injunction two other judges, namely, Honorable J. Warren Davis, United States Circuit Judge, and Honorable Robert M. Gibson, United States District Judge;

And it appearing that five days' notice of hearing by this court on such application for interlocutory injunction, to be held on Wednesday, the 31st day of July 1935, has been given to the above named respondents, to the Attorney General of the United State, and to the Intertsate Commerce Commission;

230 It appearing further from the petition that respondent, The Pennsylvania Railroad Company, has filed certain tariff schedules to become effective August 1, 1935, in compliance with the aforesaid order, whereby it will cancel the allowance which has been paid petitioner for many years past as compensation for transportation services under paragraph (13) of section 15 of the Interstate Commerce Act; and it appearing that the petitioner, in order to send and receive its shipments, will be compelled to perform such transportation services without compensation if said tariffs are allowed to become effective on said date, to the irreparable damage of petitioner, and that the operation of said tariffs should be suspended pending the final determination of the matters in controversy in this proceeding;

And the court having jurisdiction of the parties hereto and of the subject matter, and being fully advised in the premises, and upon hearing:

Now, therefore, it is ordered that during the pendency of this matter the United States of America and the Interstate Commerce Commission be, and they are hereby, restrained and enjoined from taking any steps for the enforcement and execution of the aforesaid report and order entered the 14th day of May and 7th day of June 1935 in said Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, insofar as the same apply to petitioner, Allegheny Steel Company, and the said reports and order are suspended, stayed, and set aside, pending the further order of the court.

231 By the Court:

J. WARREN DAVIS,
Circuit Judge.

R. M. GIBSON,
District Judge.

F. P. SCHOONMAKER,
District Judge.

JULY 31, 1935.

[File endorsement omitted.]

232 In United States District Court

No. 3112 In Equity

[Title omitted.]

Interlocutory injunction

Filed July 31, 1935

The petitioner having heretofore filed its petition praying for a permanent injunction against the United States of America and The Pennsylvania Railroad Company against the enforcement, operation, and execution of a certain report and order made and entered by the Interstate Commerce Commission on the 25 day of June 1935 in certain proceedings known and entitled as Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, the said order being effective on the 22 day of August 1935, and praying certain other relief as set forth in the bill; and upon motion of plaintiff for such interlocutory injunction pending the final order of the court herein;

And the Honorable Frederic P. Schoonmaker, Judge of the District Court of the United States for the Western District of Pennsylvania, pursuant to Section 47 of the United States Code, having called to his assistance to hear and determine said application for said interlocutory injunction, two other judges, namely, Honorable J. Warren Davis, United States Circuit Judge, and Honorable Robert M. Gibson, United States District Judge;

And it appearing that five days' notice of hearing by this court on such application for interlocutory injunction, to be held on
233 Wednesday, the 31st day of July 1935, has been given to the above named respondents, to the Attorney General of the United States, and to the Interstate Commerce Commission;

It appearing further from the petition that respondent, The Pennsylvania Railroad Company, has filed certain tariff schedules to become effective August 22, 1935, in compliance with the aforesaid order, whereby it will cancel the allowance which has been paid petitioner for many years past as compensation for transportation services under paragraph (13) of section 15 of the Interstate Commerce Act; and it appearing that the petitioner, in order to send and receive its shipments, will be compelled to perform such transportation services without compensation if said tariffs are allowed to become effective on said date, to the irreparable damage of petitioner, and that the operation of said tariffs should be suspended pending the final determination of the matters in controversy in this proceeding;

And the court having jurisdiction of the parties hereto and of the subject matter, and being fully advised in the premises, and upon hearing:

Now, therefore, it is ordered that during the pendency of this matter the United States of America and the Interstate Commerce Commission be and they are hereby restrained and enjoined from taking any steps for the enforcement and execution of the aforesaid report and order entered the 14th day of May and 25th day of June 1935 in said Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, insofar as the same apply to petitioner, Pittsburgh Plate Glass Company, and the said reports and order are suspended, stayed, and set aside, pending the further order of the court.

234 By the Court:

J. WARREN DAVIS,
Circuit Judge.
R. M. GIBSON,
District Judge.
F. P. SCHOONMAKER,
District Judge.

JULY 31, 1935.

[File endorsement omitted.]

235 In United States District Court

No. 3113 in Equity

[Title omitted.]

Interlocutory injunction

Filed July 31, 1935

The petitioner having heretofore filed its petition praying for a permanent injunction against the United States of America and The Pennsylvania Railroad Company against the enforcement, operation and execution of a certain report and order made and entered by the Interstate Commerce Commission, on the 24th day of June 1935, in certain proceedings known and entitled as Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, the said order being effective on the 22nd day of August 1935, and praying certain other relief as set forth in the bill; and upon motion of plaintiff for such interlocutory injunction pending the final order of the court herein;

And the Honorable Frederic P. Schoonmaker, Judge of the District Court of the United States for the Western District of Pennsylvania, pursuant to Section 47 of the United States Code, having called to his assistance to hear and determine said application for said interlocutory injunction, two other judges, namely, Honorable J. Warren Davis, United States Circuit Judge and Honorable Robert M. Gibson, United States District Judge;

And it appearing that five days' notice of hearing by this court on such application for interlocutory injunction, to be held on

236 Wednesday, the 31st day of July 1935, has been given to the above named respondents, to the Attorney General of the United States and to the Interstate Commerce Commission;

It appearing further from the petition that respondent, The Pennsylvania Railroad Company, has filed certain tariff schedules to become effective August 22, 1935, in compliance with the aforesaid order, whereby it will cancel the allowance which has been paid petitioner for many years past as compensation for transportation services under paragraph (13) of section 15 of the Interstate Commerce Act; and it appearing that the petitioner, in order to send and receive its shipments, will be compelled to perform such transportation services without compensation if said tariffs are allowed to become effective on said date, to the irreparable damage of petitioner, and that the operation of said tariffs should be suspended pending the final determination of the matters in controversy in this proceeding;

And the court having jurisdiction of the parties hereto and of the subject matter, and being fully advised in the premises, and upon hearing:

Now, therefore, it is ordered that during the pendency of this matter the United States of America and the Interstate Commerce Commission be and they are hereby restrained and enjoined from taking any steps for the enforcement and execution of the aforesaid report and order entered the 14th day of May and 24th day of June 1935, in said Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, insofar as the same apply to petitioner, Weirton Steel Company, and the said reports and order are suspended, stayed, and set aside, pending the further order of the court.

237 By the Court:

J. WARREN DAVIS,
Circuit Judge.

R. M. GIBSON,
District Judge.

F. P. SCHOONMAKER,
District Judge.

JULY 31, 1935.

[File endorsement omitted.]

238 In United States District Court

No. 3130. In Equity

[Title omitted.]

Interlocutory injunction

Filed Sept. 12, 1935

The petitioner having heretofore filed its petition praying for a permanent injunction against the United States of America and The Pennsylvania Railroad Company against the enforcement, operation and execution of a certain report and order made and entered by the Interstate Commerce Commission, on the 29th day of July, 1935, in certain proceedings known and entitled as Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, the said order being effective on the 16th day of September, 1935, and praying certain other relief as set forth in the bill; and upon motion of plaintiff for such interlocutory injunction pending the final order of the court herein;

And the Honorable R. M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania, having called to his assistance to hear and determine said application for said interlocutory injunction, two other judges, pursuant to Section 47 of the United States Code;

And it appearing that five days' notice of hearing by this
239 court on such application for interlocutory injunction, to be held on Thursday, the 12th day of September, 1935, has been given to the above named respondents, to the Attorney General of the United States and to the Interstate Commerce Commission;

It appearing further from the petition that respondent, The Pennsylvania Railroad Company has filed certain tariff schedule to become effective September 16, 1935, in compliance with the aforesaid order, whereby it will cancel the allowance which has been paid petitioner heretofore as compensation for transportation services under paragraph (13) of section 15 of the Interstate Commerce Act; and it appearing that the petitioner, in order to send and receive its shipments, will be compelled to perform such transportation services without compensation if said tariffs are allowed to become effective on said date, to the irreparable damage of petitioner, and that the operation of said tariffs should be suspended pending the final determination of the matters in controversy in this proceedings;

And the court having jurisdiction of the parties hereto and of the subject matter, and being fully advised in the premises, and upon hearing:

Now, therefore, it is ordered that during the pendency of this matter the United States of America and the Interstate Commerce Commission be and they are hereby restrained and enjoined from taking any steps for the enforcement and execution of the aforesaid report and order entered the 29th day of July, 1935, in said Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues

240 or Expenses, Part II, Terminal Services, insofar as the same apply to petitioner, West Leechburg Steel Company, and the said report and order are suspended, stayed, and set aside, pending the further order of the court.

JOSEPH BUFFINGTON,
Circuit Judge.

R. M. GIBSON,
District Judge.

N. MCVICAR,
District Judge.

SEPTEMBER 12, 1935.

[File endorsement omitted.]

241 In United States District Court

No. 3136 in Equity

[Title omitted.]

Interlocutory injunction

Filed Oct. 22, 1935

The petitioner having heretofore filed its petition praying for a permanent injunction against the United States of America, Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company, against the enforcement, operation, and execution of a certain report and order made and entered by the Interstate Commerce Commission, on the 12th day of September 1935, in certain proceedings known and entitled as Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, the said order being effective on the 31st day of October 1935, and praying certain other relief as set forth in the petition; and upon motion of petitioner for such interlocutory injunction pending the final order of the court herein;

And the Honorable R. M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania, pursuant to Section 47 of the United States Code, having called to his assistance to hear and determine the said application for said interlocutory injunction, two other judges, namely, Honorable J. Warren Davis, United States Circuit Judge, and Honorable F. P. Schoonmaker, United States District Judge;

And it appearing that five days' notice of hearing by this
242 court on such application for interlocutory injunction, to be held on Tuesday, the 22nd day of October 1935, has been given to the above named respondents, to the Attorney General of the United States, and to the Interstate Commerce Commission;

It appearing further from the petition that respondents, Missouri Pacific railroad Company and St. Louis-San Francisco Railway

Company, have filed certain tariff schedules to become effective October 31, 1935, in compliance with the aforesaid order, whereby they will cancel the allowance which has been paid petitioner heretofore as compensation for transportation services under paragraph (13) of section 15 of the Interstate Commerce Act; and it appearing that the petitioner, in order to send and receive its shipments, will be compelled to perform such transportation services without compensation if said tariffs are allowed to become effective on said date, to the irreparable damage of petitioner, and that the operation of said tariffs should be suspended pending the final determination of the matters in controversy in this proceeding;

And the court having jurisdiction of the parties hereto and of the subject matter, and being fully advised in the premises, and upon hearing:

Now, therefore, it is ordered that during the pendency of this matter the United States of America and the Interstate Commerce Commission be and they are hereby restrained and enjoined from taking any steps for the enforcement and execution of the aforesaid report and order entered the 12th day of September 1935, in said Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, insofar as the same apply to petitioner, Pittsburgh Plate Glass Company, and the said report and order are suspended, stayed, and set aside, pending the further order of the court.

(243) It is further ordered that the operation of the aforesaid tariff schedules filed by respondents, Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company, to become effective October 31, 1935, cancelling the aforesaid allowance to petitioner, be and each of them is hereby suspended, pending the further order of this court.

J. Warren Davis,
Circuit Judge.
R. M. Gibson,
District Judge.
F. P. Schoonmaker,
District Judge.

October 22, 1935.

(244) In United States District Court for the Western District of Pennsylvania

Equity No. 3110

American Sheet & Tin Plate Co.

v.

United States, et al.

Equity No. 3111

ALLEGHENY STEEL CO.

v.

UNITED STATES, et al.

Equity No. 3112

PITTSBURGH PLATE GLASS CO.

v.

UNITED STATES, et al.

Equity No. 3113

WEIRTON STEEL CO.

v.

UNITED STATES, et al.

Equity No. 3130

WEST LEECHBURG STEEL CO.

v.

UNITED STATES, et al.

Equity No. 3136

PITTSBURGH PLATE GLASS CO.

v.

UNITED STATES, et al.

Narrative Statement of Evidence Before the Interstate Commerce Commission in "Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services"

Filed Feb. 11, 1937

[File endorsement omitted.]

(245) Before the Interstate Commerce Commission.

Docket Ex Parte 104

Part II. Terminal Services of Class I Carriers

STATLER HOTEL, BOSTON, MASS.,
September 15, 1931, 10 a.m.

Before: Director W. P. Bartel, Examiner C. M. Bardwell.

Met pursuant to notice.

Appearances: (The names of counsel and representatives appearing for the numerous railroads and industries are printed on the first seven pages of the Report of the Interstate Commerce Commission dated May 14, 1935, attached to each of the petitions as Appendix A, are omitted here.)

Statement of the Examiner

Director BARTEL. The Interstate Commerce Commission has assigned for hearing, at this time and place, Ex Parte Docket 104, Part 2, covering Terminal Services of Class I Carriers.

You gentlemen have probably noticed that in this Ex Parte 104, the Commission has divided it into parts, and the part to be heard this morning will be Part 2. Accompanying the notice of hearing, we sent out a notice of information to be sought at the hearing.

Now the information to be sought is outlined in that notice and
(246) was addressed principally to the carriers. There has been some feeting, apparently, that this was a carrier hearing and not one for the shippers. I want to dissipate that thought. The shippers are entitled to their full hearing, and we will expect them to proceed with anything which they might have at this hearing, in addition to the cross-examination of witnesses for the carriers. (Similar statements of the examiners were made at the opening of numerous other hearings at various places but need not be repeated for this record.)

247 Allegheny Steel Company

(Hearing held October 28, 1932, at Pittsburgh, Pa.)

JAMES O. CARR was called as a witness, having been first duly sworn, and testified as follows (Vol. 10, p. 10147):

DIRECT EXAMINATION

I am Vice-President of the Allegheny Steel Company.

The plant of this company is in Harrison Township, Pennsylvania. This plant now comprises what was prior to May, 1929, the Allegheny Steel Company and the West Penn Steel Company. The consolidated plant covers about 100 acres of ground, approximately 70 to 75 of which are covered by buildings. It is adjacent to the tracks of the Conemaugh Division of the Pennsylvania Railroad on one side and the Allegheny River on the other, so that it is accessible

to both rail and river transportation. The yard trackage is in excess of 10 miles. This company manufactures steel products beginning with the open hearth furnaces down to and including finished products such as sheet steel, boiler tubes, pipe steel, and iron castings, various kinds of railroad supplies, and high grade alloy products. The first attempt to secure an allowance was made in 1917. Extensive cost studies were made by the railroads, but before they were completed Federal control intervened. When the railroads were returned to their own management, we renewed our application for a terminal allowance because we felt that we were doing an immense amount of work that properly belonged to the railroads. Finally, in 1920 or 1921, the Commission (in 60 I. C. C. 575) ordered the Pennsylvania to either perform the service or
248 grant an allowance. Later the railroad notified this company that it proposed to do the work and made its appearance for that purpose, but at that time the industry was not prepared to have the railroad come into the yard, and the matter was again delayed for several years. During this time there were numerous changes and improvements made at this plant. In 1929 the Pennsylvania was again requested to either perform the service or grant an allowance. Following this, further cost studies were made, and, consequently, this company was notified that an allowance would be granted on the basis of the costs ascertained in 1916. About 1930 the railroads began to grant an allowance for doing the work from their interchange track to points throughout the plant. All the trackage from the interchange track and throughout the plant is owned and maintained by this company. In 1918 or 1919 this plant handled 25,000 cars annually covering raw materials inbound and finished materials and waste outbound.

CROSS-EXAMINATION

The plant's tracks were never owned by the Pennsylvania (10147–10150).

JOHN R. TAYLOR was called as a witness having been first duly sworn, and testified as follows (Vol. 10, p. 10150):

DIRECT EXAMINATION

I am Chief Engineer for the Allegheny Steel Company.
249 I have charge of all the engineering work for this company and am familiar with the plant structures and tracks.

(A blueprint of this plant was received in evidence and marked "Exhibit C–147") (p. 10151, Vol. 10). This exhibit shows the plant tracks, buildings, and equipment. There are 10.2 miles of trackage within the plant, all of which is located on company property.

CROSS-EXAMINATION

There are approximately 150 separate tracks at this plant. There are 10 regular points for loading and unloading, but sometimes other locations are used. This plant is served only by the Pennsylvania Railroad. This plant has seven locomotives (10150–10152).

W. L. MIMM was called as a witness having been first duly sworn, and testified as follows (Vol. 10, p. 10152).

DIRECT EXAMINATION

I am Yardmaster for the Allegheny Steel Company, and have held that position for eight years, and am thoroughly familiar with the movement of the cars at this plant. The ten points of loading and unloading do not include those at the scrap yards. There are three regular unloading places at the scrap yard, exclusive of the locations for steam crane unloading. At present there are five spots for steam crane unloading.

CROSS-EXAMINATION

In normal times five locomotives are kept in use. This
250 power performs intraplant as well as interchange service. We have our departments grouped, numbered from 1 to 11. About 80 cars, loaded and empty, are moved in this plant daily. About two-thirds of the engine time is devoted to intraplant work. I know of no physical conditions in respect to the plant's tracks that would prevent the Pennsylvania from performing the interchange services in the same manner in which we perform them. The Pennsylvania has never performed the spotting service during my time—for the past 15 years. In normal times there are about eight trips a day from and to the interchange tracks for inbound and outbound movements. The plant engines move the outbound cars from the various units as they are ready to go, and take the inbound cars from the interchange tracks at such time as a particular plant unit requires them. Usually a unit requires cars for loading as soon as it is relieved of loaded outbound cars. Inbound cars are first taken from the interchange track, weighed on the track scales, and then spotted for unloading and loading. These weights are taken for industrial purposes and for railroad shipping weights. Outbound cars are weighed light and gross for industrial and railroad purposes. The 80 cars mentioned are the normal movement of inbound cars a day (10159–10162).

JAMES O. CARR was recalled and testified as follows (Vol. 10, p. 10159):

CROSS-EXAMINATION

This industry thought that when the allowance of $1.07 was
251 granted that it should be more. It was based on the 1915–16 costs. The allowance covers the movement of the cars from the interchange track to the scales, and to the ultimate destination in the yard. This company performed this service for 29 years without an allowance. Application was made for an allowance in 1917 principally for the reason that this company thought it was doing work the carrier ought to do. The tracks which are shown on "Exhibit C–147" as shift and storage tracks are the two interchange tracks. The plant's tracks have materially changed since the decision in 60 I. C. C. 575. An extract from the record in that case, embodying certain parts of Witness Carr's testimony, is shown as follows:

"Q. Is the Allegheny Steel Company willing to have the trunk lines come in and do the spotting work if the tracks are in such condition that the trunk line locomotives could operate over the tracks? I am referring simply to the spotting work.

"A. From my standpoint I would say yes if they do it as expeditiously and as efficiently as we do it ourselves.

"Q. What do you mean by expeditiously and efficiently?

"A. Just exactly what I say.

"Q. Is the placing of a car at one certain point a matter of any great efficiency?

"A. Yes, sir.

"Q. In what way?

"A. Well, if you have to wait two or three hours to get a car at the point where you want it from one service, and you can get it in twenty minutes from another service, the quicker service is the one that we require and we desire.

"Q. Then, you mean you would not want the trunk line doing the spottting service unless they would spot the car when you wanted it spotted?

"A. I would certainly want it spotted when we wanted it and as we wanted it spotted.

"Q. You would not want it done at the convenience of the trunk line?

"A. No. The convenience of the trunk line from (fol. A–7862) my standpoint is not the convenience of the consignee or the shipper.

What might suit the railroad convenience might entirely delay
252 the operation of our plant and also delay the production of finished material for shipment over the railroad which is seeking freight from us in the largest volume it can obtain, both inbound and outbound.

"Q. Well, now, assuming, as I think we shall prove later, that at the large plants in the Youngstown District, for instance, the trunk line road puts inside the plant locomotives of their own and that the movement of these locomotives and their work for the entire time

that they are there is subject to the plant's orders, would a similar arrangement be satisfactory so far as you are concerned?

"A. I think it would. It would be much more expensive to the railroad though than it would to make an allowance for doing the work."

Q. Do you recall making substantially those responses to the questions?

A. It sounds like me.

Q. Have you any different opinion now in reference to the service that is being performed at your plant?

A. I wouldn't think so.

Q. Does about the same situation exist except there has been some change in the tracks and you have increased the volume of traffic?

A. I think so (10159–10162).

W. L. MIMM was recalled and testified as follows (Vol. 10, p. 10162):

DIRECT EXAMINATION

The eight hours devoted to interchange service is not consecutive, but is spread throughout the day. This plant works 24 hours a day. The remaining 16 hours are devoted to intraplant movement (10162–10163).

C. P. DIXON, Asst. Train Master, Conemaugh Division, Pennsylvania Railroad, was recalled and testified as follows (vol. 10, p. 10163):

DIRECT EXAMINATION

I am familiar with the track layout at the Allegheny Steel Company plant which comes under my jurisdiction. The power the Pennsylvania has in this vicinity could not do the spotting at this plant because it is too large to take the curves.

(253) This railroad does have power that can do it but not in this vicinity. To perform the services at this plant the Pennsylvania would have to furnish power suitable to negotiate this industry's tracks, which would have to work under the jurisdiction of the plant yardmaster—under his orders, of course, because we would not know what requirements he would have. This carrier has never performed these services to my knowledge. It is my opinion that it would cost the carrier more than $1.07 per car to handle this service, because the carrier would not realize anything from the additional power necessary to switch the plant. If called upon to recommend which is the more economical and efficient method of performing that service, my recommendation would be that we continue paying the allowance and having them perform their own service. It might involve a large expense to eliminate the curves at this plant. Possibly, because of the plant layout, they could not

be eliminated. Whether they were eliminated or not would not make any difference from the standpoint of efficiency or economy. All the inbound cars are delivered by this carrier to certain designated interchange tracks. All the outbound cars are delivered by the plant to certain designated interchange tracks. The Pennsylvania does not classify this industry's cars. The railroad does not ask this company to weigh the cars. There is an arrangement whereby the outbound weights are acceptable. If this railroad took over this service and imported two small engines for that purpose, they would not be of any other use on this division (10163–10166).

W. C. GLYNN, Asst. to General Traffic Manager, Pennsylvania R. R. Co., was recalled and testified as follows (Vol. 10, p. 10166):

DIRECT EXAMINATION

The amount of allowance granted to the Allegheny Steel
(254) Company is the result of the usual cost study made by the allowance accounting committee. It was determined in the same manner as those granted to other iron and steel industries. The time consumed beyond the track scale was chargeable to plant service, and was taken care of as in all other cost studies. I am not aware that any change has been made in the formula in connection with the disposition of time at the track scales (10166–10168).

255 West Leechburg Steel Company

256 (Hearings held October 15, 1931, at Pittsburgh, Pa.)

W. C. GLYNN, an employee of the Pennsylvania Railroad, was called as a witness, having been first duly sworn, testified as follows (Vol. 3, p. 2220):

DIRECT EXAMINATION

I will take, for example, the West Leechburg Steel Company as typical in reference to whether or not Pennsylvania system power can enter a plant and perform the spotting without interference with the industrial operations.

The allowance at this plant is $1.28 per car. It is a plant facility operation. The actual transaction in connection with that particular case was about as follows. As I recall—it took place back in 1926. The West Leechburg Steel Company were performing their spotting service with their own power. They requested us to either perform the spotting service or make them an allowance, calling attention to the fact that other iron and steel companies having competitors were getting an allowance on the 1916 cost basis. Our answer to them was that we would be glad to perform the work and make the first spot under our tariff obligation. It was found that—our operating people developed that the tracks in all instances were not such that we could negotiate the power we had operating in that general locality.

We explained that feature to the industry and they immediately got to work on the tracks of the plant facility and put them in shape for us to perform the work. We performed the work for a period of six or nine months, maybe longer. We determined it was quite costly, so we reported the matter to our Accounting committee, who controls the cost studies in the official classification territories, and requested them to make a study on the 1916 cost basis, as well
257 as the present day cost basis. Our operating people in that vicinity and the operating people of the industry participate in the cost study. They developed the plant facility cost to be $1.28 per car.

The industry was not particularly satisfied with that amount. They felt it should have been on the per day cost basis. We advised them that we would continue to perform the service rather than make any increase over and above the 1916 costs, because that was the basis generally used in making allowances to plant facilities. They finally accepted the allowance of $1.28.

The fact that the spotting service was costly to us was reported to us by our Operating department. Our local crews would spend several hours spotting the cars within the plant. I don't know that there was any interference within the plant. We felt it would be more economical to employ the industry to perform the service on a cost as low as $1.28 per car for the reason that it was costly to us, because of the time occupied by our crews in holding up the local trains handling the line hauls or local traffic.

By Director BARTEL:

Q. Well, was it reported to you what caused the delay to your crews in spotting this plant?

A. Just the time to go in and out, I don't recall the details of it, Mr. Director. The mere fact that it would be more economical to employ the industry to do the work we are obligated to do beyond the interchange was reported to us by the operating people, and a study followed.

258 Director BARTEL. I think it is very important, Mr. Orcutt, that we have some operating people here to explain the operation to us, as to why the engines were delayed to such a large extent to enter the plant, which made it so costly to the Pennsylvania to perform the spotting service within this plant. You can have somebody here to tell us that? I don't mean at this hearing——

The WITNESS (interrupting). I don't mean to infer the engines were delayed. The work that is necessary to do there is what kept them there. As far as I know, there was no interference inside the plant—no unnecessary delay.

I don't know that it was a more costly operation than a team track, or placing a lot of cars on team tracks. The fact that the engines had to stand there and do that work was where the objectionable features came in. The delivery cost more than the allowance came to and we could use our engine to better advantage some place else and employ the plant to do this work (2228–2231).

259 West Leechburg Steel Company

(Hearing held October 28, 1932, at Pittsburgh, Pa.)

N. D. CARPENTER was called as a witness having been first duly sworn, testified as follows (Vol. 10, p. 10246):

DIRECT EXAMINATION

I am Traffic Manager for the West Leechburg Steel Company. This plant is located at Leechburg, Pa., and manufactures hot and cold rolled strip steel and skelp steel. It is served only by the Pennsylvania. Since 1927 it has received an allowance of $1.28 per car for completing the transportation service by moving the cars to and from the points of unloading and loading. In 1925 this industry asked the Pennsylvania either to grant an allowance or perform the service as was being done at plants of its competitors. On May 8, 1925, the railroad notified the industry that it would not grant an allowance, but preferred to do the switching, and the industry agreed to that. An investigation by the Pennsylvania disclosed the fact that there were some curves and turn-outs which this railroad's power could not negotiate. The industry repaired its tracks to meet the approval of the carrier, and on March 7, 1927, the latter began the switching. Two shifts a day were given—one in the morning and one in the afternoon. On May 22, 1927, the Pennsylvania as a matter of economy decided to withdraw its power and pay an allowance. The usual cost study was made by the carrier in conjunction with the industry resulting in the allowance now being paid as published in P. R. R. tariff G. O. I. C. C. No. 14755. In 1929, this plant received 4,845 cars and shipped 6,363. In that year this plant operated on 67.2 percent of its capacity. At present this plant has one locomotive engaged in interchange work and one locomotive crane used in intraplant work only. In normal times, it works
260 about seven days a week, 24 hours a day. At present the mill is only working one eight-hour shift every other week, but one locomotive is in operation at all times when the mill is running.

A blue-print of the mill and the track lay-out was received in evidence and marked Exhibit C–156.

The tracks of the Pennsylvania are north of the industrial property line which is drawn between the plant buildings and the continuous rail line marked "P. R. R. westbound" and "P. R. R. eastbound." The interchange tracks are located between the P. R. R. westbound tracks and the industrial property line. There are two interchange tracks, one for inbound traffic and the other for outbound. The Pennsylvania gives two inbound and two outbound shifts a day. When the plant power hooks on to the inbound cars at the interchange tracks, the cars are moved west on the inbound interchange track to a point near the 16-inch hot mill marked "scale", in red pencil, on the blue-print; farther down to the spur just east of the P. R. R. westbound to Kiski Junction, and then back in under the

various unloading points at the 16-inch hot mill marked "Craneway", "Shipping Craneway", "12-inch hot mill Craneway", and the track leading back to the building marked "9-inch H. M." The outbound movement cars are taken from the four outbound loading platforms. The largest platform is located between the cold mill and the warehouse; the second platform at the warehouse; the third at the 16-inch hot mill; and the fourth at the 12-inch hot mill. The inbound cars are weighed for industrial purposes only. At the time the cost study was made the time spent at the scales was deducted from the time charged to interchange work. Outbound cars are not weighed.

About 40.58 percent of the plant's locomotive time is spent in
261 interchange service, and 59.42 percent in plant service. These figures are taken from the cost study, but represent present conditions. The time ratio is constant regardless of the volume of business (10247–10251).

CROSS-EXAMINATION

When the Pennsylvania did the spotting at this plant their locomotive worked at this plant about one hour to one hour and a half in the morning and about the same time in the afternoon. But this was insufficient to take care of all the interchange work. Cars were left on the interchange tracks and the plant had to complete this work. Usually the Pennsylvania's locomotive only spent one hour in the morning and one in the afternoon at this plant. The carrier fixed a definite amount of time to devote to the interchange work. The railroad never did satisfactorily perform the spotting services at this plant. While we have two shifts a day there are cars placed at different times a day by through trains; for instance, the cars that we receive from the Bethlehem Steel Company at Johnstown are usually placed at our plant by a Pennsylvania train somewhere around three or four o'clock in the afternoon, and quite often we could not wait until the following morning for the railroad to spot those cars for unloading, and it was necessary for us to get the cars, weigh them, and get them into the mill and unload them. During the period that the Pennsylvania handled this spotting service the cars were weighed in the same manner as they are now. The spotting by the Pennsylvania was unsatisfactory because cars were left on the interchange track by through trains after the afternoon shift. The plant could not wait for the morning shift to receive these because it was necessary to use the material immediately, so it was necessary for the industry to go out and get the cars itself (10251–10255).

262 C. P. DIXON, an employee of the Pennsylvania Railroad, was recalled and testified as follows (Vol. 10, p. 10255):

DIRECT EXAMINATION

I am familiar with circumstances under which the Pennsylvania undertook the spotting services at the plant of the West Leechburg Steel Company. The local crews performed the switching there at certain times during the day. Cars would be set off on the interchange track by through trains when these crews were not present. The crews reported to the man at the plant in charge of the switching and performed all the service that was required and then the crews would leave. The power of these through trains was not suitable for this plant. As the plant worked 24 hours a day and some of the cars so set off were needed by the industry, it had to go out and get them as no Pennsylvania power was available until the next shift. As this arrangement could not keep up with the requirements of this industry, the Pennsylvania decided to go back to the old shifting power. The railroad engine that switched this plant came from Kisiminetas Junction, four miles away and performed the service at this industry along with other regular work in this district. We would certainly not leave a plant with work undone and any work left undone probably developed after the switch engine had left. The engine would not leave work undone at the plant because of a time limitation. It would be possible that the industry would not give any instructions regarding certain cars and they would be left on the interchange tracks. Any instructions the plant gave our crew for placing cars would be followed. We couldn't perform the service when they needed it. At a mill there
263 are always times when they want a shift made, you don't have your power there and they cannot afford to wait two or three hours, and sometimes we would have to send an engine up from Kiski Junction to perform the service. That was not satisfactory to us or to them. To spot the plant in a satisfactory manner it would be necessary to assign a locomotive to this plant all the time to place the cars at the time they were needed. This would be more expensive than the present allowance. I would recommend that the present arrangement be continued (10253–10258).

CROSS-EXAMINATION

It would be expensive to send a shifter from Kiski Junction to spot cars left by a through train. It would be penalty time. There is nothing unsual in the operation of this plant. The demands of this company are not unreasonable as compared with other steel industries. The local service of the Pennsylvania just could not keep up with the operations. If this plant was in Pittsburgh instead of out in the country, the servicing of this plant would not be so costly. The present arrangement is more economical for the Pennsylvania and more satisfactory to the industry (10258–10260).

264 Weirton Steel Company

265 (Hearing held October 28, 1932, at Pittsburgh, Pa.)

A. S. EARP was called as a witness having been first duly sworn, testified as follows (Vol. 16, p. 10219):

DIRECT EXAMINATION

I am Traffic Manager for the Weirton Steel Company and have held that position for 17 years. The largest plant is at Weirton, West Virginia. It produces tin plate, sheet iron, strip steel, slabs, billets, sheet bars, and coke by-products. In 1929 this company handled 96,022 loaded cars, and during nine months of 1932 it handled 34,519.

A blue-print of the plant layout was received in evidence and marked "Exhibit C–153."

A typewritten statement showing the growth of this plant year by year since it started was received in evidence and marked "Exhibit C–154."

Before 1909 the land on which this plant is now located was farm land. Up to March 1921 the company did its own spotting at the No. 1 Blast Furnace, Steel Works, and 6 Open Hearth Furnaces, and No. 7 Open Hearth Furnace. An allowance of 84 cents was offered in 1921 but was not accepted or published in a tariff. An allowance of $1.23 was published effective August 15, 1929, but was never accepted by this industry. It has continued to allow the railroad to do the interchange work. It has never taken over this interchange service or availed itself of the allowance. The question of an allowance was first taken up about 1919 or 1920. It was not settled until 1929 because of the

266 fact that the plant was building so rapidly that there was no fixed operation upon which a cost study could be made. The allowance was not taken advantage of after it had been published because the plant did not have enough locomotives to do the entire job of spotting. If the interchange work had been taken on in addition to the plant work, we would have to purchase three large locomotives and supply additional tracks.

The first unit erected at this plant is marked on Exhibit C–154 as "Tin Mill" in white pencil. It has grown to be a twenty-six mill plant from the twenty mills originally installed, with various other supplementary things that have been changed.

"Q. About as simple a lay-out as could well be?

"A. If you get proper clearance and curvature, you can't make them any shorter railroad track than what they are."

This initial unit had a simple lay-out. The original turn-out is marked No. 4 on Exhibit C–154, and had four stub tracks leading from that. The industrial tracks on plant property aggregate about 25 miles, and something like 14 miles for the railroad company, which is shown in red on Exhibit C–153. This company, because of

the changed character of operations and the volume of production, now handles more traffic per mile of track than it did at the original unit. The numbers in white pencil on Exhibit C–154 indicate the point of connection with turn-outs from the Pennsylvania track on their property where they hook up to our private tracks.

Starting at East Weirton, turnout No. 1 is an emergency connection which was put in to enable engines to work into our Coke
267 Plant should there be a derailment down at No. 3 or No. 4, so there would be no interruption in the service; otherwise it is not used. No. 2 turnout connects the runout track for empties or cars from the car dumper; No. 3 turnout is the connection for the Coke Plant; No. 4 turnout is for the Tin Mill; No. 5 and No. 6 turnouts are for the Steel Works; No. 7 turnout is for the Scrap Yard; No. 8 turnout is for the Sheet Mill; No. 9 turnout is for the Steel Works; No. 10 turnout is for the 10- and 16-inch Strip Mills; No. 11 turnout is for the Steel Works; No. 12 turnout is for the 48-inch Strip Mill; and No. 13 is for the 48-inch Strip Mill.

The Pennsylvania performs all the interchange service at this entire plant. Iron ore is unloaded at the steel works on the special track for the car dumper. Limestone is unloaded on the blast furnace tracks between the ore yard and the furnace property. Scrap is unloaded at the open-hearth stock house. The unloading of the other inbound commodities are indicated by letters on the blue-print. Coke and its by-products are loaded at the screening station. They move right out the lead track to the railroad at No. 3. Steel products are loaded at the bar yard and move to connection No. 9. The products of the tin mill are loaded on the two tracks paralleling the two sides of the assorting and warehom tin house and move out through connection No. 4 (10219–10225).

The products from the sheet mill are loaded from two tracks at the "Assembling and Shipping Building" and move out through
268 connection No. 8. Products from the Strip Mill load on both sides of the building and the cars are taken out through connection No. 10. At the 48-inch mill they are loaded in the building marked "Shipping and warehouse building" and move outbound through connection No. 13. The longest move from the Pennsylvania connection to a point of placement in the plant yard is about 5,200 feet from connection No. 5 to open hearth stock house. The shortest move is 400 yards—inbound loads to the scrap yard from connection No. 7. The Pennsylvania locomotive works over four or five miles of this industry's private track. The average distance from the turnout to the point of placement is 2,300 feet. This plant has five large locomotives and four small 4-wheel engines that work when the plant is operating in full. The large engines are used for intraplant work. The small engines are really departmental equipment and are used for handling special equipment like ladles and pan cars. They often remain in one building where they are constantly used. The Pennsylvania serves the Weirton district with one engine 24 hours a day at the Steel Works for spotting service; one

engine, 16 hours a day at the Strip Mill for spotting and intraplant switching at tariff rates; and one engine 24 hours a day for spotting service at the freight house, team tracks and several industrial plants, including the Weirton Steel Company's Sheet Mill, Tin Mill, and Coke Plant, and also makes one trip a day to Weirton Junction. This utility locomotive spends on an average of seven or eight hours a day at the departments of the Weirton Steel Company, and the balance at other industries in the Weirton switching district, besides trips to the Weirton Junction (10225–10229).

269 The engine at the Weirton Steel Company on the first trick, starting at 7 o'clock in the morning, works 1½ hours to 2 hours at the Coke Plant; 1 to 1½ hours at the Tin Mill, and about 1½ hours at the Sheet Mill. The second crew, starting at 3 p. m., works ½ hour at the Tin Mill and ½ hour at the Sheet Mill, and the third trick crew, starting at 11 p. m., works ½ hour at the Coke Plant, 1½ hours at the Tin Mill, and ½ hour at the Sheet Mill. Out of the 3 tours of duty of locomotives, a total of 7 or 8 hours is spent for our company and the balance of time is spent in serving other industries in the Weirton district.

Inbound iron ore, coal, or limestone is not weighed except in very rare cases. When we have reason to suspect there has been a large loss in transit, then it is reweighed in the presence of a railroad representative to protect claims. Shipments of sulphuric acid in tank cars are all weighed regardless of the department they go to because of the inability to unload the entire contents of a car. A check weight of these cars is made to determine the amount received. Some plants get a car every other day, some get a car every day when they are busy, but that work is incidental to the switching of the tracks at these departments, because the scales are so located that no additional work would be entailed in performing the weighing. At the plants other than the Steel Works the weighing is done by railroad power, but in the Steel Works the weighing is performed by our own power. We pay for the reweighing in accordance with the tariff. Where the cars are reweighed by railroad power on account of claimed inaccuracy of weight, the so-called gambling clause comes into play, that is, if the difference exceeds the

270 tolerance, we don't pay for it, but if the difference is within the tolerance, we pay for the reweighing. Some of the inbound materials are weighed. At the Steel Mill the cars are taken over the scales by plant power. At all the other units of the plant they are taken over the scales by the Pennsylvania. In such cases the industry pays the tariff charge. If the cars are reweighed by railroad power the so-called gambling clause comes into play. In reweighing at the Steel Mill the car is put on the interchange track by the trunk line, taken off and weighed by the plant, and then put back on the interchange by the plant, and then carried to the final place of unloading by the trunk line. There is no charge for this service because the plant power does it.

"Q. And the movement from the P. R. R. red line here to the point of final placement is interrupted, or at least during the movement from P. R. R. tracks to the point of final placement there intervenes the movement by your power to scale and back again?

"A. Yes."

All the outbound material is shipped on invoice weights except commercial coke. Cars of coke are now weighed on the plant's scale immediately after loading. No outbound freight is weighed at the Tin Plate Department or the Structural Mill. The output of the Strip Steel Department is weighed in order to check errors, but the bills of lading carry the invoice weights under agreement with the trunk line Weighing and Inspection Bureau. The scale for this purpose is on the route of movement from the loading platform to the trunk line. There is a charge for this of 32 cents plus 10 per cent extra per car. The only place that there would
271 be an out-of-line movement from loading point to trunk line via a track scale would be at the Steel Works Department. But this scale movement is done by the plant's power. The Pennsylvania sets out all cars inbound for the Steel Works Department at turnouts Nos. 5, 6, and 7. Only about two tracks are used for that purpose. The remainder of the tracks are used for intraplant cars. At the Steel Works there is a Pennsylvania engine that does the spotting of the inbound loads and taking up of the outbound loads. At all other departments the Pennsylvania crew that brings the load in spots them and the engine that removes the outbound loads from the tracks takes them out. The Pennsylvania crew that brings the inbound loads in will start one day at 9 o'clock in the morning spotting at the Coke Plant, noon at the Tin Mill, 1 p. m. at the Scrap Yard and Sheet Mill, and on their second shift to these departments would be repeated at about those same hours in the evening—9 p. m., midnight, and 1 or 2 o'clock in the morning. Approximately, that is the schedule, but it is not adhered to rigidly. It varies sometimes three or four hours when things happen to interrupt the movement of the railroad engine. The plant sets up a schedule at each department of the plant, and the Pennsylvania works approximately on that schedule. The idea is to work the movements so as to be convenient for each plant unit. This also happens to make it easier for the operating crew of the railroad. The foreman of the Pennsylvania engine is given a pull slip at each plant department
272 which tells him where to spot the cars and what cars to take out. He is well acquainted with the operations, as it is regular routine work.

Generally the carrier brings all the cars destined to this plant when the engine leaves its classification yard. Occasionally a car is held out in the yard on orders from this industry. Cars placed in this yard are considered constructively placed whether they are held there or not. The ones held there are not brought to the plant on a special switch but are brought in on the regular movement. The engine assigned to the Steel Plant works under the supervision

of the yardmaster or foreman of the Steel Plant, who gives the engine foreman a written work order telling him what cars must be moved to a certain department and when. The Pennsylvania engine is there to do what the industry wants done. This engine is assigned to stand-by service 24 hours a day, 7 days a week. This particular department could not be worked on schedule. An engine must be at hand all day long. In normal operation this engine does not have any idle time. There are 25 miles of track at this plant and in addition to this, 12 to 15 miles of track are on railroad property, which is shown in red.

A blue-print marked "Shippers' Exhibit" was received in evidence and marked Exhibit C–155 (10229–10237).

REDIRECT EXAMINATION

The tracks in red on Exhibit C–155 indicate the relocation of the main line of the Pennsylvania (C. & F. Division) which required this carrier to reach the tracks of the Weirton Company by operating over what is now being assigned to the Wheeling Steel Corporation.

The yellow track is the private track of the Weirton Steel Company. The green track is the Wheeling and Lake Erie. This refers to the Steubenville property. No allowance is received at this
273 plant. It does not possess any power. The larger part of the inbound switching is handled by the Pennsylvania and all the outbound finished material by the Wheeling and Lake Erie. About 1,000 outbound and inbound loaded cars per year are handled at this plant. The track scale is used entirely for weighing interplant coal.

RECROSS EXAMINATION

The conditions at our Steubenville plant are identical with those at the Tin Mill at Weirton. There is no necessity for an engine to be at this plant all day. The usual thing is two switches a day. Very seldom are cars held out in the railroad yard at the request of the industry. Once in a while they are held out overnight because of lack of space. This plant has one connection with the Pennsylvania and two with the Wheeling & Lake Erie. The Wheeling & Lake Erie has access to all of our tracks and the Pennsylvania only to such tracks as handle inbound freight. There is no conflict between carrier power because the engines are in the plant at different hours during the day. All intraplant movements are made by railroad engines on shifting orders. There is no conflict whatever at this plant. This is exclusively a tin mill (10237–10239).

T. H. KRICH, an employee of the Pennsylvania Railroad, was recalled and testified as follows (Vol. 10, p. 10239):

DIRECT EXAMINATION

274 The plant of the Weirton Steel Company at Weirton, West Virginia, comes under my jurisdiction. The previous witness gave an accurate description of the services performed there by the Pennsylvania. All work performed by this railroad at this plant is done under the direction of the industry. There is no more interference with the operations of this railroad by intraplant movements at this plant than there is ordinarily in any railroad yard. This carrier's schedule at this plant is made to conform with the industry's schedule. Only occasionally is there any interference by the industrial power. Such interference might arise from car failures, engine failures, or an unusually heavy amount of work within a certain distance. This interference is not serious enough to increase the operating costs ordinarily incurred in spotting an industrial plant. The same kind of interference also occurs within our own terminal yards. With reference to the Steel Plant, there are two distinct movements required on the industrial track in getting those cars finally in a location for unloading, but only one movement is required to make the final spot for unloading at other locations.

I also have jurisdiction over the Steubenville plant. The testimony of the previous witness as to the terminal services at this plant was very accurate. The operation at Weirton is the biggest on the division. The present systems of synchronizing the two services, i. e., the inbound movements and the plant operations, is the best method that has yet been devised. In fact, it is the only way it could be economically accomplished by the railroad. As to whether it would be possible for the Pennsylvania to spot the cars at any time it was especially convenient to it or without having some arrangement with the industry; I don't believe they could operate under such circumstances.

275 CROSS-EXAMINATION

The cars are spotted at the Steel Mill, under the present schedule, just as cheaply and economically as can be done (10239–10246).

276 Pittsburgh Plate Glass Company (Ford City, Pa.)

277 (Hearing held November 1, 1932, at Pittsburgh, Pa.)

H. A. PUTNAM was called as a witness, being first duly sworn, testified as follows (Vol. 10, p. 10403):

DIRECT EXAMINATION

I am Assistant Superintendent of the Pittsburgh Plate Glass Company at Ford City, Pennsylvania, and have been in charge of

the industrial track operations since 1926. This plant is located about 30 miles north of Pittsburgh and is served only by the Pennsylvania Railroad. The principal product of our plant is plate glass.

Since September 1927 we have been receiving an allowance of 65 cents per car. We have two locomotives and plant trackage of eight or nine miles. The total cars handled in interchange service for the year 1929 was 6,017; for 1930, 4,043; and for 1931, 3,396, about one-fourth to one-third of the total being outbound and the rest inbound raw materials. At present we are operating only one locomotive and that on an average of three hours a day. According to my judgment about one-third of the total time of the locomotive is spent in intraplant work. Our principal inbound commodities are coal, sand, limestone, soda ash, lumber, and plaster, while glass is the principal outbound commodity, although we do have an occasional car of some other material. I was not a witness in nor familiar with the case brought before the Interstate Commerce Commission by the Pittsburgh Plate Glass Company against the Pennsylvania about 1920 involving this matter. [The case referred to is reported at 58 I. C. C. 81.] This industry has always performed the spotting service at this plant except in 1925 or 1926 when the Pennsylvania did it for a week or ten days. I was then informed that they were through doing that work, and within
278 my knowledge, that is practically all I know of any change in the operation or anything that approaches or indicates a cost study having been made. I find that the general average cost per ton of doing all our plant work and interchange work is about 15 cents per ton. If there was a separation between the intraplant and interchange costs, I would say the intraplant would be more expensive, because intraplant loads are usually very light—it is very seldom a full car is handled, so that 15 cents per ton is not a figure that could with any appropriateness be checked against a 69-cent allowance.

A photostat showing the track lay-out was received and marked "Exhibit C–160—Witness, Putnam."

The Pennsylvania Railroad inbound interchange track is located from our scale office, which is between Sixth Street and Seventh Street, up to the Pennsylvania Railroad station, is opposite Ford Street, and is about one-quarter mile in length. The Pennsylvania Railroad outbound interchange track is located north of No. 6 Factory, north of the blast switch, shown on the map, and extends north from the blast switch for about one mile. This track is not exclusively a Pittsburgh Plate Glass interchange, but is known as the Ford City storage track and serves not only our Ford City plant, but all other industries. The photostat copy of our plant shows all the unloading points.

279 There are four or five unloading points at Plant No. 6, which is the northerly unit, practically the north one-third of the plant layout. Starting at the north, the first unloading point is

marked "Unloading Point for Breeze Coal", and next is the unloading point for batch material, sand, soda ash, etc.

There are two unloading points at Shop 2, which is located south of Plant No. 6.

There is one unloading point for lumber just southwest of the scale house, between Sixth and Fifth Streets. There is also one unloading point at each of the following, namely, packing room, store room, polishing shop, pipe shop, etc., and one or two unloading points at each of the operating units of the glass works.

Gondolas are loaded at a point on the east side of the building designated on the map as the packing and shipping room, which is just north of Warehouse No. 3, and south of Fifth Street. Box cars are loaded on the west side of the same building. We have some additional loading at the south end of Shop 2, between Sixth and Seventh Streets. For our No. 6 unit there is one unloading point on the east side, just south of Eighth Street.

To the best of my knowledge, the Pennsylvania Railroad engines could enter the plant and perform spotting. We have one track with a 30-degree curve, but it is used only for intraplant work.
280 There is also one track which is used infrequently for interchange where the curvature is 25 degrees. Outside of these two tracks, there is no part of the plant in which the Pennsylvania Railroad's engines could not operate. I have heard that in the past when one of our engines was out of commission that locomotives were rented from the Pennsylvania Railroad. All inbound freight is weighed, and the outbound package weights are taken (10403–10409).

CROSS-EXAMINATION

Our scales are located on the first track just north of Sixth Street on the east side of the factory. Inbound traffic is weighed for industrial purposes.

It is my judgment that The Pennsylvania Railroad could at the present time enter the plant and perform spotting with its own power without interfering with our industrial processes. Our engine makes an average of three trips a day to the interchange track, and the practice each trip is to clear the interchange. We gather loads from the spots at least twice a day. One locomotive could perform all our spotting service at this plant if it were there at the proper hours, that is, at hours which would have to be designated by the industry. Normally we require a locomotive only five or six hours a day for interchange service, between the hours of 10 a. m. and 4 p. m. During that period our own power can be engaged in intraplant work (T10409–10412).

C. P. DIXON, of the Pennsylvania Railroad, was recalled and testified as follows (Vol. 10, p. 10412–10414):

281 DIRECT EXAMINATION

The Ford City Plant of the Pittsburgh Plate Glass Company is located on the Pennsylvania Railroad within my jurisdiction, and I am familiar with the terminal service rendered by the Pennsylvania Railroad as well as with the layout of the industrial tracks.

From an operating point of view, there is nothing to prevent the Pennsylvania Railroad from entering the plant and performing spotting.

It is my opinion that it would be more economical for the railroad to continue paying the 65-cent allowance than to perform spotting, inasmuch as the service required at the plant covers a spread period, calling for from approximately five to six hours' service. If we did the spotting, we would have to put an additional engine in the plant to render the required service. We couldn't perform the service with the local engine we now have, and therefore it would be more economical to continue the present practice.

I do not have any information showing comparative costs of operating the industrial engines as against those for operating the railroad engine. I do know the industry does not use as large a switching crew as the railroad, which fact should make its operating cost lower than ours (10412–10414).

W. C. GLYNN, of the Pennsylvania Railroad was recalled and testified as follows (Vol. 10, p. 10414):

DIRECT EXAMINATION

The 65-cent allowance to the Pittsburgh Plate Glass Company is purely an arbitrary figure. When we decided to pay
282 an allowance to that industry for performing spotting service, we determined 65 cents would be about as near as we could figure, one-third of the cost to the railroad. At the hearing complainants presented exhibits back in 1919, indicating that their cost from August 1, 1917, to July 1, 1919, was $1.45 per car, as shown in the decision of the Commission. We felt our costs would be higher than that, so we agreed with the then General Traffic Manager of the industry upon a flat allowance of 65 cents per car. A tariff was issued, effective September 1, 1914, in which was published the allowance with a notation to the effect that the tariff was issued in compliance with the decision of the Commission in Docket 10806. This question of an allowance was not one necessitating its reference to the Terminal Allowance Committee. Following the decision of the Commission, we made a formal tender to perform spotting, but the industry was doing considerable construction work and was not prepared to permit us to enter the plant. On July 1, 1927, the industry's traffic manager advised us that the tracks were then

in shape, and requested us to come in and perform the service, which we began to do on August 2, 1927, and continued until September 11, 1927. The service was so unsatisfactory that we agreed to take our power out of the plant, and the plant agreed to continued to perform the service without compensation up to the time our tariff became effective on September 14, 1927. I do not know the
283 details which caused the dissatisfaction. Evidently the work inside the plant, our engine in there at the same time caused an unsatisfactory arrangement. We were not satisfied with the arrangement, which was very costly from a railroad standpoint. Our operating department complained about the work we were doing, saying it would be more satisfactory if an arrangement could be entered into under which the industry could be compensated for the service, rather than we continue performing it. We thought that the 65-cent allowance was a very good deal (10414–10416).

284 Pittsburgh Plate Glass Company (Crystal City, Mo.)

285 (Hearing held May 26, 1932, at Kansas City, Mo.)

GEORGE W. OAKES, Superintendent of Crystal City, Mo., plant of the Pittsburgh Plate Glass Company, was called as a witness having been first duly sworn testified (Vol. 6, p. 6361):

DIRECT EXAMINATION

I have been superintendent of the Crystal City plant of the Pittsburgh Plate Glass Company since January 1, 1921. I am familiar with the industrial tracks at that plant.

A blue-print map showing the track layout at this plant was received in evidence and marked "Commission's Exhibit A–151, Witness Oakes."

The plant is served by the Frisco (St. Louis-San Francisco Railway Company), and the Missouri-Illinois Railroad Company, a subsidiary of the Missouri-Pacific Railroad Company. The connection of our industrial track with the tracks of the Missouri-Illinois is by means of a branch line indicated on the blue-print by the words "to M. P. Lines." This branch line extends for more then a mile, i. e., there is a mile of industrial tracks extending from the plant to the line of the Missouri-Illinois. The connection with the Frisco is marked on the blue-print as "St. L.-S. F." The interchange is located upon the plant tracks and those are the tracks that lead away from a point on blue-print marked "Crystal City Station" of the St. Louis-San Francisco Railroad.

Mr. HAGERTY. Let the records show that the blue-print from which the witness was talking, identified as exhibit A–151, has been substituted by a blue-print furnished by the St. Louis-San Francisco Railroad.

A blue-print furnished by the St. Louis-San Francisco Railroad showing the industrial tracks and the connection with the Frisco

was received in evidence and marked "Commission's Exhibit No. A–152, Witness Oakes."

On Exhibit A–151 the witness has shown the connection of the Frisco tracks to be in the vicinity of what is marked Crystal City Station of the Frisco and that location on Exhibit No. A–152 is identified by the term "depot", near a figure 40 in a circle (T. 6361–6364).

286 J. S. McMILLEN, Superintendent, St. Louis-San Francisco Railroad Company, was called as a witness, having been first duly sworn, testified as follows (Vol. 6, p. 6364):

DIRECT EXAMINATION

I am superintendent of the Frisco Railroad and have supervision over the River Division, St. Louis to Memphis, which includes track extending through Crystal City, Mo., and particularly the tracks connecting with the plant of the Pittsburgh Plate Glass Company at that city.

The main line of the Frisco between St. Louis and Memphis passing trough Crystal City is a single track.

Exhibit A–152 correctly shows the layout of tracks owned by the Frisco, and the connection of those tracks with the tracks owned by the Pittsburgh Plate Glass Company. We have two connections with the tracks of the Glass Company. The principal one is about 1,300 feet north of our station on the right of the map. The point of connection is at a place where Virgin Alley, if it were extended across the tracks, would intersect them. The other connection is a short distance—which is used very seldom—five or six hundred feet in a northeasterly direction from the depot indicated on the blue-print by a plus sign. 9–HB which indicates head block at the connection just described is a connection with a siding or interchange track (T. 6364–6366).

On the left of the depot are certain tracks marked Nos. 1, 2, 3, and 4. They are yard tracks which we usually have cars stored on. We don't have any trains tied up at Crystal City. We usually meet trains with cars for Crystal City about two miles south at McCoy. At McCoy there are three passing tracks which hold about 220 cars.

The switching operations at the Pittsburgh Plate Glass Company are performed by the power of the industry and the cars for the industry are received from either of the tracks in our yard heretofore referred to as Nos. 1, 2, 3, and 4, which necessitates the industry power coming out on the Frisco's main line.

287 I don't know why particular interchange tracks have not been designated, but I suppose it is for the industry's convenience. We work very closely with the industry and they get the cars from any track in our yards. That is also an advantage of convenience to the railroad—saving our time by setting out on any

track which is convenient. If we had one particular track on which to set out and pick up from, it would use more time (T. 6366–6369).

Mr. MURPHY. In connection with certain records that were made by the Frisco regarding the Pittsburgh Plate Glass Company, we submitted a copy of a contract made in 1908. Through inadvertence we failed to submit a subsequent contract made on the 28th of September 1921. I now ask that this new contract be made part of the record. This contract was received in evidence and marked "Carriers' Exhibit No. A-153, Witness McMillen."

The WITNESS. I am familiar to a certain extent with the method of operating under the existing contract of September 28, 1921, on page 3 of paragraph 3, thereof, which reads as follows:

"Glass Company shall receive all cars to be used by it wherever the same may be located on Frisco company's said tracks and moved the same therefrom to its said plant, and shall deliver the same for shipment to Frisco company on Frisco company's switch tracks at a place to be designated by Station Agent of the Frisco company at said Crystal City." That is the arrangement under which we are now working and as a practical matter when we have cars for delivery to the Pittsburgh Plate Glass Company we kick them in on the most convenient track that our train crew can find—from which tracks the Glass Company takes them out with its own engine and from there on the operation is wholly that of the Glass Company in setting these cars at the unloading spots within the plant. Cars coming out of the Glass Company plant are placed on the track designated by our station agent.

288 The outbound cars are classified by the industry and placed on the Frisco's tracks under the direction of the agent at Crystal City in the direction on which they are to be moved.

I have had an occasion to examine the tracks of the Glass Company and they are not in very good condition. The tracks are of about 80-pound rail and their tie condition is good and ballasted. They are better than our average run of that class of industrial or team tracks maintained by the railroad on our division generally. There is no reason why the Frisco could not operate over these tracks should occasion demand. Frisco engines have gone into the water supply of Glass Company in times past. That was a road engine—1200 class engine (T. 6369–6371).

I have seen three locomotives owned by the Glass Company operating within the plant. I don't know how many they have, I don't know what weight on drivers of any of them, but we have similar engines used in switching service. The Glass Company has from time to time used engine leased from us.

We operate our local freight trains on the River Division at night in order to meet the probable demands of the traffic and to some extent meet truck competition on over-night deliveries. The movement of traffic on the river division is light at this time, and the traffic to and from this plant is correspondingly light and we have more cost and expenditure due to that.

If we were to handle the switching at this plant, we would have to put a switch engine at the plant to handle the work. The engines which serve on these locals would not go into the plant due to excessive curvature. I presume that night switching would not be satisfactory to the Glass Company. Through freight engines, which are larger than the engines serving on the locals, of course, couldn't go in there—consequently we would have to assign a smaller engine to do this work. I think it would be feasible to assign an engine to this plant to do the switching for the Missouri Pacific and the Friseo.

If this was done, we should come to some agreement to let
289 one road do it for a certain period and then let the other road do it, because we might come into this plant at a time when the Missouri-Illinois was switching the plant or vice versa, and consequently there would be delay to one or the other carrier.

Under present conditions the length of time necessary to switch the plant would be approximately two hours.

In recent years, the number of cars loaded and empty handled at this plant, I would say would be from 20 to 30 cars per day. To assign an engine to this plant to switch 20 or 30 cars a day would consume between 4 and 5 hours. We would not be able to use the assigned engine at any other point because we wouldn't have any work in that territory where it could be used.

The reason why it would take 5 hours to switch 20 cars is on account of the physical layout. A switcher would have to go very slow around the buildings and there are a good many men working within the plant. It takes considerable time to switch that plant. As far as I know the industry would permit us to perform the switching. They have a gate at their plant and at times it is kept closed. To switch the industrial tracks would be much more complicated than that of the ordinary industrial or team track that I am familiar with.

If we were to switch the plant I suppose it would be necessary to make provision against interference with the plant operation, at our own yards where we have more than one engine they interfere with one another. We try to avoid that by having one engine working in one part of the yard and one in another. At this point we have no yard-master, while the Glass Company does.

CROSS-EXAMINATION

We do not operate any switch engines at Crystal City now. All of the outbound and inbound traffic from the Glass Company is handled by local freight trains from the point of interchange. In a general way the inbound commodities consist of lime, salt cake, coal, soda ash, lumber, and machinery. The principal outbound tonnage is the finished product glass, and some scrap iron and various other things. There is considerable classification of cars required
290 with reference to inbound traffic before spotting at various unloading points within the plant.

The Glass Company places the cars on the interchange track in the direction to be moved on our first train passing.

The Pittsburgh Plate Glass Company receives an allowance of 65 cents per car for performing the switching service (T. 6371–6377).

291 WILLIAM A. BROWN, Yard Master and Switch Master for Pittsburg Plate Glass Company, was called as a witness having been first duly sworn, testified as follows (Vol. 6, p. 6377):

DIRECT EXAMINATION

I am yard master and switch master for the Pittsburg Plate Glass Company. My duties as yard master at the Crystal City plant of the Pittsburgh Plate Glass Company embrace the placing of all materials for the plant. My duties also cover shipments from the plant. I heard the testimony of the previous witness, J. S. McMillin, superintendent of the River division of the Frisco and concur in same.

The distance from the tracks numbered from 1 to 4, inclusive, on the map exhibit No. A-152 to the point of connection on the main line opposite Virgin Alley is about 1,300 feet. We take the cars for the plant off any one of those tracks. We operate over the main line of the Frisco to reach those tracks. I have been examined under the Frisco book of rules by J. F. Wright, J. S. McMillen, and by a Mr. Feagin. When we go to interchange tracks numbered 1 to 4 to get cars for the Glass Company—if they are at the south end, if they are to go over to the house track we go down over the bend (track No. 4 which we call a run-around track) and run the cars around to our yard. This movement is not performed every day—I would say 2 or 3 times a week. Our receipts of carload shipments and of empty cars for loading are comparatively small at the present time. They are about one-half of what they are in normal times.

292 When we bring in the cars from the yard we run them over a scale and then place them for loading or unloading. I am also a sworn weigh master at this plant. A scale is located about 200 feet from the point next below where the first track within the plant turns sharply to the right on the blue print. There are 10 locations for unloading in the plant. Exhibit A–154 indicates correctly the points of loading and unloading at the plant. Commodities set on the track within the batch house track for unloading are soda ash, lime stone, salt cake. In other words these cars are pushed up an elevation and pushed opposite bins where the contents of the car are dumped.

Exhibit A–154 also indicates the points of loading and unloading of various commodities received at the plant and glass outbound. It is customary to place loaded cars on one or another of the connecting tracks of the Frisco as indicated by the agent according to the direction it is to go (T. 6377–6382).

CROSS-EXAMINATION

The handling of these loads to and from our plant by the plant engine, is done at our own convenience. Our power is free at any time to enter upon the Frisco tracks and pull, or place loads or empties. The inbound loads are moved from the industrial tracks as the industry wants them removed (T. 6382).

B. H. STANNAGE, of the Frisco Railroad, was recalled and testified a follows (T. 6383):

CROSS-EXAMINATION

The 65-cent allowance was made to the Pittsburg Plate Glass Company, published in item 845, on page 46 of the Frisco
293 tariff I. C. C. 9570, loaded or empty cars, covers the entire service at Crystal City, which is covered under our line-haul rates, either in receipt of traffic for movement outbound or traffic handled in the reverse direction, which arrives by the Frisco to Crystal City, and is delivered to the spot at the plant for unloading. In other words, it covers the service of making the delivery of freight in the plant or receiving the freight onto the Frisco tracks on the outbound movement. It does not stop at the plant gate. I can't say that the allowance was based on a study, because the allowance dates back to the opening of the Frisco line through Crystal City, and from the best information I could develop by making inquiry and looking at our files, the service on the part of the industry was considered by our management as being the most economical and at a less cost than we could perform the terminal service in the plant as contemplated under the line-haul rates, rather than for the Frisco to perform that service.

I have no knowledge as to how the 65-cent allowance was arrived at. Our files do not show it, because this matter goes back to far. Our tariff covers both loaded and empty cars. All terminal service contemplated under our line-haul rates in delivering and originating traffic. On an empty going into the plant for a load and removing the same car out under load we would pay two 65 cents or $1.30. This would also be true in a case where a car was carried in and returned empty. In other words, the tariff says that the Frisco will pay to the Pittsburg Plate Glass Company for switching
294 services which the latter performs for account of that railroad, in switching of freight in their plant at Crystal City, an allowance of 65 cents per car, loaded or empty (T. 6383–6385).

Our file does indicate there was some question raised about particular movements, and there was a conference called to discuss the matter as to whether there were so-called fictitious moves made; but after the matter was thoroughly investigated by our accounting, operating, and traffic departments, it was determined that our tariff

provided for an allowance of 65 cents per loaded or empty car covering the move, which the investigation developed were actually made. Our tariff contemplates an allowance for the movement of an empty car moving in to secure a load, and not being loaded, but our empty moving back to the interchange track, and the same empty being taken back for another load, because they are performing this service, in lieu of our having to perform this service. We would have to perform that move.

If we had our order for an empty, whether or not we would move that car out to the yard and back, or leave it in the yard, would depend entirely on the circumstances. Lots of times when the loaded car is made empty you wouldn't know whether the new load is to be loaded right at that particularly time the next day or the day following, and the empties are taken out to the yard to go to the connecting lines or down for a load.

I don't know why in this case we provide for an allowance on both the load and empty cars and in a number of cases in this record, allowances only apply on the loaded movement, because this was agreed
to such a long time ago that our files don't indicate why that
295 was done; but I do know this, that this allowance is a very
nominal one, and our people have looked into the question. At the time this present contract was entered into we were advised by our operating people that the amount was an economical one and that the arrangement was an economical one an dthat the allowance we contemplated giving them was reasonable; less than we could have performed the service for. Of coure, they might have made it $1.30 round-trip movement (T. 6385–6386).

If the carrier were called upon to perform this service and had to do it that way just for the convenience of the plant, I would say that the service would not be included in our line-haul rates, because it is our position that the service must be done at our convenience. Of course, there are times when by being accommodating you can accommodate your switching arrangements to those of the industry without any additional cost. It must be mutual convenience. What I mean to imply was we don't think it is our duty to go in there and spot a car every hour or two, whenever the industry wants it. I do not agree with certain other testimony in this record that would be an obligation on the part of the carriers.

I think that the tariff authorizes an allowance of 65 cents for switching in the plant. By that I mean that I do not think it is necessary that the empty car made empty at a given spot must come back out into the yard, and then be subsequently moved back to another spot. I think the tariff authorizes an allowance of 65 cents a car where a car might be made empty at spot "A" and then moved over
to spot "C." The movement might not be 100 per cent of
296 what it would be from spot "A" to the interchange track and
then back to "C" (T. 6386–6388).

WILLIAM A. BROWN, Yard Master for the Pittsburg Plate Glass Company was recalled and testified as follows (Vol. 6, p. 6390):

DIRECT EXAMINATION

Cars are never loaded outbound from the Pittsburg Plate Glass Company plant without making intervening moves between the time when they are unloaded and the time when they are loaded. If one car is empty, if we are going to reload it again, we bring it up to our scale track and weigh it and then spot it wherever it is to be loaded. We have no spots in this plant where we load at the same spots that we unload. The railroad accepts our outbound loaded weights in computing freight charges. We weigh empty cars to check-weigh them, check light weights. We do that for the plant. It may be for both the convenience of ourselves and the railroad. We do not want to accept the tare weights of the cars because they vary quite a little sometimes. If the carriers were switching the plant, they probably would be asked to perform the weighing of empty cars.

Mr. MURPHY. I just want the record to show by this witness that there is no spot at which unloading is done and from which loading is done, and I wanted the record to show, also, that the cars are actually moved between the interval between the time they are unloaded and the time they are loaded outbound.

297 The WITNESS. It would cost us, I judge, just about as much to handle a car between the Frisco tracks into the property of the plant as it would to transfer an empty car from the spot where it is unloaded to the spot where it is loaded. The average shift of an empty car in our plant from point of unloading to point of loading is quite a distance in some places, is about one-half mile.

298 The car would have to be spotted specially. That is to say, if an empty car was called for at a particular spot or particular location we would go to one of our unloading tracks and pick up that car and carry it over to the spot with our own power. If it so happened that we had no load at an unloading point, an empty available, we would have to come out on the Frisco tracks and find one and bring it back. It takes about the same time to go from our tracks out on the Frisco tracks and find an empty and spot it as it would to go to one of our unloading places in our plant to spot the car (T. 6390–6393).

H. SCHANTE, Master of Trains and Tracks, for the Missouri-Illinois Railroad Company, was called as a witness, having been first duly sworn, testified as follows (Vol. 6, p. 6393):

DIRECT EXAMINATION

At present I am Master of Trains and Tracks, for the Missouri-Illinois Railroad Company. I have been connected with this railroad since August 1, 1906. I was also connected with the Mississippi

River and Bonne Terre Railway, previous to the time those properties were leased by the Missouri-Illinois. Those properties are operated by the Missouri-Illinois, a subsidiary of the Missouri Pacific.

I am familiar with the location of the tracks of the Mississippi River and Bonne Terre Railway Company and also with a location of the tracks of the Pittsburg Plate Glass Company.

A map showing the physical connection between Pittsburg Plate Glass Company and the Mississippi River and Bonne Terre Railway Company was received in evidence, and marked "Carrier's Exhibit No. A-153, Witness Schante." [The correct designation of the Exhibit as marked on original is "A-153."]

299 At the lower left hand corner of the map are the words "P. P. G. Co. works No. 9." Those words mean Pittsburg Plate Glass Company, works No. 9. Extending from the Frisco Tracks on the lower left hand corner of the map is a railroad called the Crystal City Railroad, connecting with the M. R. & B. T., which latter railroad is owned by the Glass Company. The connection of the Crystal City Railroad with the M. R. & B. T., as it existed back in 1923, is as follows: The head block at station 76 plus 30 on the main track of the M. R. & B. T. Railway, where this track leads out from the M. R. & B. T., the first 534 feet of that connection is on the right of way and is the property of the M. R. & B. T. Railway, now the Missouri-Illinois Railroad. From that point to the plant of the Glass Company Works, the ownership is in the Pittsburg Plate Glass Company. The distance from the connection with the Crystal City Railway to the connection with the plant tracks of the Glass Company is about 8,100 feet.

The Missouri-Illinois had a right to use a portion of the tracks of the Crystal City Railway—about 6,000 feet—to a point where there are two open tracks for our use as interchange tracks in handling business to and from the Glass Company. The Missouri-Illinois Railroad secured the right to use that strip of track from them in 1929 by agreement. Previous to the time that agreement was entered into for use of the tracks up to these two spotting tracks used for interchange, the interchange was made at a side about 1,000 feet from the turnout of the main line of the M. R. & B. T. Railway, which would be about 7,000 feet from the

300 plant of the Glass Company. Since 1929 arrangements have been made whereby the interchange of cars may be effected at the turnout leading to the two interchange tracks, about 2,100 feet from the Glass Company Plant.

The receiving and delivering of loads to the Glass Company, and in delivering empties from that plant to the Missouri-Illinois, before that time, that service was performed by the Glass Company up to the then existing connection with the M. R. & B. T. rails where the interchange was made. The Missouri-Pacific acquired the Missouri-Illinois, as I understand it, January 1, 1929 (T. 6393-6396).

I was with the M. R. & B. T. Railway at the time the first allowance was made to the Pittsburg Plate Glass Company, I would say about December 1923, for performing that service, and at that time the interchange was about 7,000 feet from the Glass Company's Plant. The present point of interchange has shortened the length of the service about 5,000 feet.

Under the present operations the Missouri-Illinois Railroad serves the Glass Company by local and through freight trains. The termini of those freight trains are Bonne Terre and Herculaneum, Bonne Terre on the south and Herculaneum on the north. The distance between the two terminals is approximately 29 miles. The Missouri-Illinois has no yard at Crystal City. If the spotting service within the Glass Company's Plant were performed by the carrier, it would have to be performed by the engine of the combination local and through freight trains. At the time of this hearing the average number of cars per day handled to and from the Glass Company by the Missouri-Illinois is about four or five cars. Under normal times the number of cars handled to and from this plant would probably average double the number above mentioned (T. 6396–6398).

301 I concur in the testimony of Superintendent McMillin of the Frisco lines concerning the character of the tracks of the Glass Company and the adaptability of those tracks to the operation of engines of the railroads. In order for the Missouri-Illinois engines to reach the Glass Company's Plant, it would be necessary to cross the main line of the Frisco. The spur from the plant of the Glass Company, referred to as the Crystal City Railway, was built by the industry.

If the carriers were required to switch the Glass Company's tracks—that is, deliver the cars to and from the Company's Plant—the most feasible method would be through pooling service by the railroads, because there isn't enough work for either one railroad to employ an engine continuously and if we were to do the work independently it would interfere with each other more or less. It would require a lighter engine to perform the switching within the plant than the engine we employ by the Missouri Pacific in its loading services, because of the curves being rather sharp, an ordinary loading engine could not be used. The amount of time required to switch this plant would depend upon where the loads or empties would be spotted. From the present interchange track, with the present amount of traffic, I would say it would average about an hour. The present engine hour cost is about $8.00 an hour. We regard the present service as more economical for the Missouri-Illinois to deliver and take from the present interchange tracks. We could deliver the cars into the plant if we were asked to. We would cross the Frisco main line in reaching the plant, I assume, of course, that the Frisco would not interfere. We have had our engines across that track on

302 one or two occasions. We do not have any agreement with the Frisco to cross its tracks. If it is a matter of tonnage from the plant, I suppose the Frisco might object (T. 6398–6401).

CROSS-EXAMINATION

As to the length of time the lessor company—the Mississippi River and Bonne Terre—have had direct track connection with the tracks of the Pittsburgh Plate Glass Company—the so called river route of the M. R. & B. T. was built in 1901, and it has been a connection with it ever since that time. That connection was through the Crystal City Railway as it existed at the time of this hearing. The original company was the Crystal Plate Glass Company and they built the railroad some five years or more before this hearing. This railroad was taken over and was absorbed by the St. Louis, Memphis & Southeastern when they built into the property of the Glass Company, and this connection designated the Crystal City Railroad also a spur built out to the river bank whereby the plant of the Glass Company got its coal, which was barged up the river; and when the river route of the M. R. & B. T. was built along the river a physical connection was made to the terminal. As I understand it, the Pittsburgh Plate Glass Company was organized in 1896 or 1897 with the entire plant of the Crystal City Plate Glass Company as one of the works that they acquired. The Crystal City Railroad was made use of only for switching the Pittsburgh Plate Glass Company and not in serving the public generally as a carrier.

303 The arrangement for an allowance to the Glass Company was entered into in December 1923, before the Missouri Pacific had control of the M. R. & B. T. or Missouri-Illinois Railroad. The arrangement for the interchange and the allowance was made for the industry, doing the work of the railroad. At that time the interchange was track designated as No. 1–1171. The sole consideration for the use of the tracks known as the Crystal City Railroad was the maintenance of those tracks by the Missouri-Illinois—covered by an agreement or contract. In order to maintain that track in such condition that our heavier locomotives could operate thereover, we furnish the nonsalvageable material and the Glass Company furnished the salvageable material. If many rails are required or tie plates, they are furnished by the Glass Company. We furnish the ties and labor. That is the extent of our obligation. That constitutes the entire condition under which the use of that particular track was acquired by the Missouri-Illinois (T. 6401–6403).

That agreement was about the same year the Missouri-Illinois was acquired by the Missouri-Pacific. I know nothing about the arrangement for an allowance.

Prior to the acquisition of the Missouri-Illinois by the Missouri-Pacific, the commodities handled by that line for the Glass Company, inbound coal, lumber, and the products that go to make up the batch for glass, which at that time, was interchanged with the Missouri-Pacific. The through rates at that time, were divided between the Missouri-Illinois and the Missouri-Pacific.

The Missouri-Pacific is the only railroad with which we have a physical connection. We speak of the Missouri-Illinois; up until

304 1929 the Missouri-Illinois was a separate corporation from the Mississippi River and Bonne Terre Railroad. We had a physical connection, but it was at Derby, Mo., in the lead belt, that is about 8.5 miles south of Bonne Terre. In 1929, the Missouri-Illinois Railroad became the lessor of the M. R. & B. T. and the M. R. & B. T. moved out of the picture as an operating company. That was just about the time the Missouri-Pacific took over the control.

I don't know what prompted the change in the point of interchange shown at the extreme right on the blue print, where we formerly interchanged tracks, because at that time I was chief engineer of the railroad and not in charge of operating or traffic. From an engineering standpoint it is necessary if we were to operate with our engines over the tracks of the M. R. & B. T., to take over the maintenance, or at least we felt that it was, to keep it in satisfactory condition for our locomotives. That extends up to the head block of these two tracks, and we maintain one and the Glass Company another. If we are called to operate beyond that point we would certainly have an inspection made before we operated over the tracks. If we should go beyond that head block on the main tracks we would supply tracks to do it. It isn't unusual to maintain private side tracks, for the Missouri-Pacific, to handle traffic over, it is the custom. We have a similar proposition when trains are loaded in the lead belt. We want to assume the maintenance work in order to have tracks over which we can operate safely (T. 6403–6405).

I do not feel obligated to maintain any or all tracks we are called upon to operate over. I don't want to maintain that particular
305 track, but I do want to control the maintenance of the track in a safe condition for the operation of our locomotives. It would be the usual thing to expect reimbursement for the maintenance of this track by the industry but they do not do so in this case.

While I stated I do not know why we changed the point of receipt of the Glass Company's traffic from the point shown on Exhibit A–153, I don't say that the truck was safe up to that time, for our power to operate thereover. I did have acid cars on the plant tracks at several times with our work engines, and always sent our foreman ahead to make sure the track was in shape for this weight (T. 6405–6407).

W. A. Rambach, Assistant to President in charge of Traffic Development, Missouri-Pacific Railroad Company, was called as a witness, having been first duly sworn, testified as follows: (Vol. 6, p. 6407):

DIRECT EXAMINATION

I am assistant to the President in charge of Traffic Development of the Missouri-Pacific Railroad Company. I have been with that company quite a few years. I remember the Mississippi River and Bonne Terre Railroad Company before the Missouri-Pacific leased

it, and before the Missouri-Pacific took control of the Missouri-Illinois.

The allowance to the Glass Company was first made by the M. R. & B. T. Railroad Company in 1923. That was about six years before the Missouri-Pacific acquired the Missouri-Illinois.

When the question of an allowance by the M. R. & B. T. Railroad Company to the Pittsburg Plate Glass Company, came up, the question with the Missouri-Pacific was traffic; it was entirely
306 a competitive arrangement, as we view it. After our first communication with the Glass Company, and then later with the M. R. & B. T. offices, the Missouri-Pacific published an item in its tariffs under which they made an allowance to the Glass Company for the services which the M. R. & B. T. might be called upon to perform. The amount of the charge at that time was $2.00 a car for a round trip, loaded and empty. The Glass Company never applied to us for an allowance. We sought an arrangement merely as a traffic inducement.

The allowance was afterwards changed. The Commission sent out a general questionnaire and an investigation was made, and in view of the 7,000 feet distance, we negotiated an arrangement for changing the point of connection with the M. R & B. T., and took up with the offices of the Glass Company the shifting of the point of the interchange and what we thought to be a fair price, and it was determined at about 75 cents per car, which was less than we had been paying. That is the amount we are now paying for loaded and empty cars. That service covers the movement of the loaded car to the Glass Company Plant and the return of the empty and the spot on the tracks of the industry.

The Missouri-Pacific participated in the allowance which was granted by the M. R. & B. T. to the Glass Company, as I looked upon it at the time—probably erroneously—as an actual competitive situation. It was taken as such by the then Vice President in charge of traffic of the M. R. & B. T.

When a railroad that doesn't reach the industry makes an allowance or participates in an allowance—the direct line should ordinarily make the allowance, the line which is actually perform-
307 ing the service. Recognizing that, we have recently changed our tariff so that the Missouri-Pacific does not now participate with the Missouri-Illinois in the allowance. I mean by that, that the switching charge of the Missouri-Illinois has been reduced from $2.00 round trip to 75 cents for each move (T. 6407–6410).

A. J. SEVIN, General Traffic Manager Pittsburg Plate Glass Company; called as a witness, being first duly sworn, testified (Vol. 6, p. 6411):

DIRECT EXAMINATION

I have served in the position of General Traffic Manager for the Pittsburg Plate Glass Company since January 1, 1931. Prior to that date I was Assistant General Traffic Manager. So far as the

change in the interchange via the Mississippi River & Bonne Terre is concerned, that arrangement was made entirely by J. M. Billings, General Manager of the Glass Company at the time, and Philip Thomure, Vice President of the Mississippi River & Bonne Terre. Both of these men have since passed on, and the only men who actually knew why the change was made. I of course, had some knowledge of it, and my opinion is that it was a traffic competitive proposition. We could not be expected to handle business way down there to the Mississippi River & Bonne Terre with the Frisco right there. It was a question of the Missouri Pacific wanting some traffic and providing facilities through which it could get it. (T. 6411).

W. A. RAMBACH, Assistant to the President, in charge of traffic development, Missouri-Pacific Railroad Company, was recalled and testified as follows (Vol. 6, p. 6412):

308 DIRECT EXAMINATION

The allowance we make applies on all cars, unless the tariff naming the rates make some exceptions. So far as I know there are no exceptions (T. 6412).

F. P. SACKBAUR, General Freight Agent of the Missouri-Illinois Railroad, was called as a witness, being first duly sworn, testified as follows (Vol. 6, p. 6413):

DIRECT EXAMINATION

I am the General Freight Agent of the Missouri-Illinois Railroad. I have been connected with the Missouri-Illinois sixteen years, and before that time with the Mississippi River & Bonne Terre Railroad.

There was a very low rate of 49 cents a ton on chat and the tariff carried a provision that there would be no switching charges—the rates would be net to the M. R. & B. T. Railroad. The tariff was later amended to provide for an allowance on chat as well as sand and gravel when destined to the Pittsburg Plate Glass Company (T. 6413–6414).

309 American Sheet & Tin Plate Company

310 (Hearing held Nov. 2, 1932, at Pittsburgh, Pa.)

W. A. CRAMER was called as a witness having been first duly sworn, and testified as follows (Vol. 10, p. 10444):

DIRECT EXAMINATION

I am employed by Subsidiary Companies, U. S. Steel Corporation, at Pittsburgh, Pennsylvania, Transportation Division.

From 1917 to 1929 I handled practically all phases of the transportation problems pertaining to the business of the American Sheet

& Tin Plate Company, except for a short period with the Ford Motor Company, at Pittsburgh, in a similar capacity. From 1929 to October 1, 1932, I was division freight agent, the American Sheet & Tin Plate Company, having direct charge and supervision of transportation, which necessitated spending considerable time at our various plants. I have been in my present position since October 1, 1932, and am familiar with the railroad operations at our Vandergrift plant, and more especially the track layout, the terminal services incident to the inbound and outbound movement of cars, and the method of handling such services. This plant is located 40 miles east of Pittsburgh on the Conemaugh division of the Pennsylvania Railroad.

It is my opinion that the terminal services performed at our Vandergrift plant are typical of such services performed at the various plants named in the order setting these hearings.

The Vandergrift plant has been in operation for more than 30 years, and is a steel mill engaged in the manufacture of steel
311 by the open hearth process, and the conversion of steel into various grades and finishes of sheet steel by rolling process. Our principal inbound commodities are scrap, pig iron, limestone, ores, sulphur, spelter, lumber, rolls, annealing boxes, grease, and miscellaneous mill supplies. Our outbound traffic consists principally of various grades of sheet steel and sulphuric acid. The plant is served by the Pennsylvania Railroad, which has an interchange connection at the west end of our property. We have about five loading and fifteen unloading points regularly used in the course of operations, located at an average distance of 2,500 feet from the point of interchange, the farthest-distant location from the point of interchange being 5,400 feet and the nearest 800 feet. The American Sheet & Tin Plate Company owns the right-of-way and tracks from the point of interchange to the points of loading and unloading. Considering 1930 as a normal year, we received 5,783 cars inbound and moved 6,181 cars outbound.

The applicable rates and tariffs and the construction which has been placed upon them by both railroads and shippers for many years, require the Pennsylvania Railroad, as connecting common carrier, to perform the service of placing cars at designated locations in our plant for loading and unloading. The Pennsylvania does not itself perform such spotting service, it being done by the American Sheet & Tin Plate Company with its own locomotives. After the railroad has placed loaded or empty cars on the designated interchange tracks, our engine takes the cars and spots them at the various places within the mill for loading or unloading, after which the cars, either loaded or empty, are taken by our engine back
312 to the interchange tracks. This terminal service which I have described is performed by us as agent for the Pennsylvania Railroad, and for the performance of this service the railroad pays *the railroad pays* an allowance of $1.10 per car, which includes removal of loaded or empty cars from the interchange tracks to points

within the mill and the return of loaded or empty cars to the railroad at the interchange tracks. The allowance was first initiated in July 1917. The amount of such an allowance was arrived at on the basis of a study of costs of performing the spotting services at various points by an auditor's committee of the Trunk Line Association, which recommended to the traffic officers stated amounts to be published in tariffs as allowances to industries for performing the spotting service. Since the allowance was first made, the amount of the allowance has averaged about 43 percent of the cost of the spotting service. From the very beginning, the cost to the industry has either equalled or exceeded the amount of the allowance.

An exhibit showing the amount of allowances received annually and the cost of the performance of the terminal services in each year was received in evidence and marked "Shipper's Exhibit C–163, Witness—Cramer."

American Sheet & Tin Plate Co. would be willing to permit the Pennsylvania Railroad Company to perform the spotting service if it so wished. In my opinion the industry is able to perform the spotting service cheaper than the Pennsylvania Railroad could perform the same service. The performance of the terminal service by the industry results in a double saving to the railroad: (1) The amount by which the allowance paid is less than the cost to the industry of performing the service; and (2) The amount by which the performance of the service by the carrier would exceed the cost of performance of such service by the industry.

313 If the railroad were to undertake to perform the spotting service in the Vandergrift plant, its performance of such service would not be interfered with by the intraplant operations of American S. & T. Co. There has been no substantial change in the nature of the terminal service required to be performed at the Vandergrift plant since January 1, 1915 (T. 10444–10448):

CROSS-EXAMINATION

We have about eight miles of track within the plant. We have two main tracks and leading from those there are about 20 or 25 other tracks.

Exhibit C–163 shows the cost to the industry of interchange or spotting service. My statement that it would cost the railroad more to perform spotting service than it costs the industry is based upon what was developed by the carrier's cost study and upon the fact that our power is lighter in weight than that of the carrier, and also, our scale of wages for switching crews is less than the carrier's. The industry has never called upon the Pennsylvania to perform the service, and it never has been performed by the carrier. The number of trips to and from the interchange track depends a great deal on what time the trains of freight arrive from Vandergrift. If the Pennsylvania sets a string of cars on the interchange, we immediately bring them into the plant if we have immediate need for them. Otherwise we bring them in in the regular course of our spotting

and work. If the Pennsylvania were to undertake to perform that service I don't have any idea that it would require the assignment of one or more locomotives for constant service at the plant on the industrial tracks, at all times, for the spotting service alone, but that depends a great deal on the amount of work to be done. The Pennsylvania would be required to place the cars after their arrival at Vandergrift as needed. To do that would necessitate co-operation between the industry and the R. R. in the matter of the assign-
314 ment of a locomotive to the plant by the railroad to perform the spotting service. That could be arranged to conform to our needs. The interchange service, as a practical operating matter could be performed without any interference between the railroad power and the intraplant service. I don't think there would be any interference.

Inbound freight, such as scrap, pig iron, and limestone is weighed for two purposes; to ascertain whether the freight charge is assessed on the correct weight, and if we are actually getting what we are paying for. Outbound traffic is weighed for railroad billing as well as for industrial invoicing. Weighing is performed by our own power on our own scales, which are located adjacent to the interchange tracks at the west end of the plant. With respect to cars that have to be weighed, the scale is intermediate between the interchange tracks and the final point of placement. We weigh a good bit of our inbound commodities. I do not understand that we are paid the $1.10 allowance for the service rendered in connection with the weighing of cars. It is my understanding that the allowance is for the placement of either loaded cars at the points of loading and unloading and the return of empties, or loads to the interchange tracks of the railroad.

The difference in cost for performance of interchange service by the industry, and the allowance paid by the railroad, as indicated on Exhibit C–163, is due to the allowance being so small. Of course the cost basis in the beginning I think, was 1915 or 1916, and in the meantime the costs have risen and the allowance has remained stationary. I think this fact accounts mainly for the difference.

I understand that we pay locomotive crews less than the standard railroad scale of rates. At Vandergrift we have five men in a
315 crew, but their hours of work are not guaranteed. Our other plants have less than five-man crews.

We would not make any more trips to the interchange track than necessary to operate efficiently. Generally, when an engine goes to the interchange track of the plant at Vandergrift, it picks up all the cars that are there and brings them into the mill and spots them. However, in emergencies, and occasionally it might happen that the engine would pick up only such cars as are immediately needed, leaving others on the interchange tracks, and the same situation exists at other plants of the American Sheet & Tin Plate Company. The weighing of inbound commodities at other plants of the American Sheet & Tin Plate Company is the same as at the Vandergrift

plant. However, there are some variations with respect to the weighing of the outbound commodities.

I know of no physical condition in connection with our industrial track from the standpoint of curvature, turnouts, cross-overs, or any other conditions, that would prevent the power of the Pennsylvania Railroad from reaching any one of the locations for loading or unloading within our plant at Vandergrift, and, generally speaking, that condition exists at all our other plants, namely, those at Wellsville and Scottdale, at which we perform the spotting.

The industry has never applied for an increase in the allowance, although we have considered doing so, using as a basis present day costs. According to my understanding, as arrived at by observation and study, the present situation results in the railroad and the industry each bearing a part of the cost of the interchange service at each of our plants (10448–10455).

316 REDIRECT EXAMINATION

The Erie Railroad performs spotting at our Farrell plant; the Pennsylvania Railroad at our New Castle plant; the Pennsylvania Railroad, and Wheeling and Lake Erie at our Canton plant; and the Pittsburgh and Lake Erie at our Monessen plant (10455–10456).

RECROSS-EXAMINATION

We have four engines at our Vandergrift plant, and in normal times, during the day at least three of them would be in constant use. Intraplant as well as interchange service might be performed by the same engine. Vandergrift is the largest of the three plants at which we perform spotting.

The allowance at the Scottdale plant is $1.14 per car, maximum. The cost of the spotting service there is in excess of the allowance. Over a period of years the allowance at Scottdale has averaged only about 54 percent of the actual cost of spotting. We have never received less than the maximum allowance of $1.14. The situation at Vandergrift is the same. The Scottdale plant has not been in operation since May 1931. At Scottdale we have a trackage of about one mile within the plant, consisting of the main track running alongside the mill, from which there are five or six spurs or extensions—sidings.

A photostat showing the track layout at the Scottdale plant received in evidence and marked "Shipper's Exhibit C–164—Witness Cramer."

Our scale is indicated on the map with an "X." The intraplant service at the Scottdale plant may be less in volume than that
317 at Vandergrift. Nevertheless, there is no essential difference between the two services. Under our present method of operation, there would be no interference if the railroad undertook to perform the terminal service and were in there at the same time our own

engines were in there. If the railroads were to perform the spotting service at both Vandergrifft and Scottdale, I don't believe in the beginning they would be just as efficient in all particulars if it were performed as the industry's power, for the reason that the railroad employees would not be as familiar with the industrial requirements as our own employees. Eventually they should be just as efficient. That is the only factor relative to efficiency that I can think of at present, although there may be others. If the carriers performed the service, I don't think they would perform the spotting work without any regard to the work of the industry. If the interchange service were performed by the railroads and the intraplant switching by the industry, it would require some cooperation between the two sides.

At the Wellsville, Ohio, plant, we have a little over one-half mile of track, consisting of one main track and four sidings, serving two loading points and four or five unloading points. At this plant we perform intraplant service with our own engine, and in so far as interference is concerned, the same situation would prevail as at Vandergrift or Scottdale. The carriers have performed spotting at Wellesville, at odd times, and they are doing so now, as the occasion demands. The mill is at present idle and the carriers come into the plant and perform whatever work is to be done.

At the Vandergrift plant there are approximately five loading and fifteen unloading points. Scrap and pig iron are unloaded in the greatest volume. In the case of scrap and pig iron, they are either handled at the open hearth yard, or else handled at the scrap storage or pig iron storage. At either place, there is plenty
318 of room for a number of cars to be placed at one time. Magnetic cranes simply travel back and forth over the cars and unbed scrap. If 7 or 8 cars of scrap come in, our engine merely places them once, and after that the maghetic crane unloads them. That same condition would be true if they were consigned to the stock scrap pile. We have room for approximately 30 or 35 empty cars to be placed on our loading docks at one time, and ordinarily, after they are placed, they do not have to be shifted in the process of loading. Loading is performed from a loading dock or platform, and in the case of open cars, by an overhead crane. Our principal outbound commodity is sheet steel, which is largely loaded in box cars, from a loading dock, and which does not require cars to be placed in a particular spot, there being no doors from which loading is done (10456–10462).

J. G. KULP, Operating Officer of the Pennsylvania Railroad, was recalled and testified as follows (Vol. 10, p. 10462):

DIRECT EXAMINATION

The Scottdale plant of the American Sheet & Tin Plate Company is located on the Pennsylvania Railroad within my jurisdiction, and I am familiar with the terminal services that are rendered at that industry in delivery of carload freight.

I heard the testimony of the industry's representative in reference to that service, and would not say that it is exactly an accurate description of the service rendered, from my point of view.

319 The witness said that we could spot the cars in the plant. We could not do it with the power that we are now using in that district. He is correct in so far as we could do it with switching engines—certain types of engines. If the Pennsylvania undertook to perform that service, it would require bringing to the plant a particular type of engine now not in common use in that general district, an engine of smaller type. In normal times it would require the assignment of that engine for constant use on those industrial tracks. It would not take one engine 24 hours per day to perform the interchange service. It wouldn't be busy at all times. At present the industry has no traffic, either inbound or outbound.

The industry receives an allowance of $1.14 per loaded car. While I have had no occasion to determine whether it is more economical for us to pay the allowance than to perform the service, it is my opinion the industry can perform the service cheaper than we, for the reason that the wages paid by the industry are not as high as those paid by us, and their power being smaller than ours, costs less to maintain, and that would also be my answer if we were called upon to perform the service, and brought to the plant from some other locality an engine of the type that could negotiate all the tracks. I think that even that would cost us much more than paying the allowance costs us (10462–10464).

CROSS-EXAMINATION

If we were called upon to perform service at the plant, from the standpoint of economy, it would not pay us to bring a small engine into the district where we are using large ones. We need the larger engines to handle the heavy tonnage that is handled at other industries.

320 Smaller types of switch engines than those now in use were in the service of the Pennsylvania in 1917, but it is my opinion that the type engine in general use in that year would not be able to negotiate the curves in the Scottdale plant.

Even if the curves were broadened so as to permit our present type of engine to negotiate the industrial track, I would recommend to my company that it permit the industry to continue to do its spotting, for the reason that the industry can do so more economically than we (10464–10465).

C. P. Dixon, of the Pennsylvania Railroad, was recalled and testified as follows (Vol. 10, p. 10465):

DIRECT EXAMINATION

The Vandergift plant of the American Sheet & Tin Plate Company is on that part of the Pennsylvania Railroad that comes within my

jurisdiction, and I am familiar with the terminal services that are rendered at that plant.

I heard the testimony of the industry's representative, and it is, in a great many particulars an accurate description of the service rendered at the plant. There are two or three cases that I didn't quite agree with him on. One of the cases was in regard to our engines negotiating the curves at that particular point. The power that we have located at Vandergrift, or in that vicinity rather, would not negotiate all the curves at the plant of the American Sheet & Tin Plate Company at that place. A second question was in moving cars to and from the interchange track to the mill for spotting, or for loading or unloading. Those are taken in by the mill shifters as needed, and in a great many instances, cars are left on interchange tracks that they do not need at the time (10466).

321 The industrial representative stated that cars were left on the interchange track only occasionally. My testimony is that cars are left there regularly. There are always cars on the interchange tracks, either loaded or empty, and that is a matter of every day occurrence, so far as my observation goes—especially true with the empty box cars.

I believe the industry receives an allowance of $1.10. The tariff covers it. While I never had any occasion to determine whether or not the Pennsylvania Railroad could perform the spotting service more economically than the industry, my personal opinion is that it is more economical to have the American Sheet & Tin Plate Company perform the spotting service at their plants than it is to have us perform it with our own power. That would also be my opinion if we had to bring in a particular type of engine from some other place to Vandergrift for the purpose of serving the plant, and that would be a matter of necessity; we would have to (10465–10467).

CROSS-EXAMINATION

If the American Sheet & Tin Plate Company were to straighten out all the curves and make an ideal track at its Vandergrift plant, so that our largest switch engines could be accommodated, and then continue to do the spotting for $1.10, we would still have to put additional power at that plant. I don't see how it would benefit us any. If the industry is doing the switching it doesn't make any difference how bad the track is, or how expensive it is to them to perform it over and above $1.10, because that is all we pay.

Q. You did not, in any answers you gave in your present examination, intend to modify anything that Mr. Eysmans had

322 testified as to the policy of your company?

A. I don't know anything about what he testified to.

Q. You would leave the policies to him, so far as they come within his jurisdiction?

A. Absolutely.

Q. You would trust him with them?

A. It would be a matter of necessity (10467–10468).

J. L. PRINGLE, the Pennsylvania Railroad, was recalled and testified as follows (Vol. 10, p. 10468):

DIRECT EXAMINATION

The Wellsville, Ohio, plant of the American Sheet & Tin Plate Company is located on that part of the Pennsylvania Railroad that comes within my jurisdiction. This plant has not operated since I have had that territory. This division has been under my jurisdiction since August 1, 1931. I am not acquainted with the terminal services at the plant.

J. D. BELTZ, the Baltimore and Ohio Railroad, was recalled and testified as follows (Vol. 10 p. 10469):

DIRECT EXAMINATION

The Scottdale plant of the American Sheet & Tin Plate Company is located on that part of the Baltimore and Ohio Railroad within my jurisdiction, and I am familiar with the terminal services rendered at that plant. I heard the testimony of the industry's representative, and so far as I know, his statements were correct. I don't think he mentioned what service the Baltimore & Ohio does there. He mentioned his own service. We place our cars on an interchange track at that plant. We could perform the service but from my observation—that is, at a distance—the curvatures look sharp for the type of engine we are using in that territory, but we could
323 perform the service as we have the same type engine they have.

It is my opinion from a practical operating standpoint that we could not enter in upon the plant tracks and perform the interchange service from our track connection to the locations of loading and unloading at a cost to our company less than $1.14 per car—it would cost us more than that figure if we performed the service. That is based upon the fact that we would have to provide the proper kind of power to serve the plant, and that we could not work that service in with the service that we now use to deliver the cars to the plant, and due to the grade on that branch line on which Scottdale is located it would not be economical to use small power. I don't know whether we would have to assign an engine to this plant or not for the amount of work we would have to do there, but if we did not assign an engine for that service the engine we would use in the branch line would be too light to handle the branch line economically (T. 10469–10471).

CROSS-EXAMINATION

If we were only to get one or two cars a day in and out of that plant, as was the case in 1933 and 1934, we wouldn't want to assign an engine there to handle that small amount of traffic. I would like

to see the plant resume and have a lot of traffic and make us pay an allowance on a lot of cars. From my observation at a distance—I did not check up the tracks to know whether we could get in, but from my observation, it would require a smaller type engine to serve the plant than we normally use on the branch line. We are not using that switch type of engine now on the branch line. There is no "burden" on the railroad as long as the industry is performing spotting at a less cost than the cost would be to the railroad if it performed spotting. As to whether the Baltimore & Ohio
324 would have to perform the service described, we would have to do it if called upon to do so.

W. C. CRAMER, of the Transportation Division of the American Sheet & Tin Plate Company, was recalled an dtestified as follows (Vol. 10, p. 10473):

CROSS-EXAMINATION

The carriers perform spotting at our plants located at Farrell, New Castle, and Monessen, and to the best of my knowledge, have always done so. The carriers perform all intraplant service at those locations under the tariff charge. The inbound and outbound commodities that are received at and shipped from the plants at Farrell, New Castle, and Monessen are different from the commodities handled at the Scottdale, Vandergrift, and Wellsville plants. The Farrell, New Castle, and Monessen plants are tin plate mills and commodities both inbound and outbound are somewhat different from those at a sheet plant. The commodities handled at the Farrell, New Castle, and Monessen plants inbound and outbound, generally speaking, are the same. The inbound commodities are sheet bars, coal, acid, pig tin, boxes, grease, and regular mill supplies, and the outbound commodities are tin plate and black plate, and at New Castle and Farrell sulphate of iron. We do not require the presence of a locomotive at any of those plants.

At Farrell, Pa., the tracks within the mill property aggregate about three and three-quarter miles, consisting of about ten
325 separate tracks, which are owned by us and located on our property. There are about 20 locations for loading and unloading carload traffic. The Erie R. R. and the Pennsylvania R. R. have direct connections with our tracks, while the New York Central and the Pittsburgh & Lake Erie connect through a switch movement.

At our Shenango works at New Castle, we have about three miles of tracks, consisting of about 10 separate tracks serving approximately 12 spotting locations for loading and unloading carload freight. The Pennsylvania R. R. performs spotting service at the Shenango works, not only for itself, but also for the Pittsburgh & Lake Erie and the Erie. The Baltimore & Ohio performs its own spotting service.

At the Farrell plant the Erie performs spotting service for all roads.

Monessen is local to the P. & L. E. so far as we are concerned. The Monessen plant has a trackage of about one mile with about five separate tracks and eight to ten spotting locations. The Pittsburgh & Lake Erie is the only railroad serving that plant.

At the Farrell plant the railroads simply place the cars at the designated locations for loading and unloading. As to whether there is anything about the industrial operation at that plant which requires that the inbound cars be set out somewhere either on our tracks or on the tracks of the railroad company prior to the placement at locations for loading and unloading, there is some weighing done. The track scales are intermediate between the final point of loading or unloading and the one interchange track. The weighing is done subject to a tariff charge. Apart from the weighing,
326 I can think of no circumstances which would require cars to be first set out and held, either on the railroad tracks or our own, prior to the placement of them in positions accessible for loading and unloading—so far as the industry itself is concerned, I know of no circumstances which would require that. The same answer is true at the New Castle and Monessen plants. The industry never performed spotting at any one of the three plants with its own power.

At our Farrell plant cars are brought by the railroad from the train yard to the track connection between our industrial track and the railroad track only as ordered by the industry. We order down what cars we require and what we need. The rest are left in the railroad yard subject to our disposition or orders. That is routine business. The railroads wouldn't place any which we didn't ask them to place. We have no interchange track at Farrell. Cars held pending our orders for placement are subject to the regular demurrage tariff charges as well as constructive placement, and there is no difference in the situation in that particular as between Farrell, New Castle, and Monessen. I do not think that the holding of cars by the carriers after arrival results in any inconvenience to the railroads in the performance of terminal service (T10473–10479).

WILLIAM WHITE, Assistant General Manager of the Erie Railroad, was recalled and testified as follows (Vol. 10, p. 10479):

DIRECT EXAMINATION

The Farrell plant of the American Sheet and Tin Plate Company is on that part of the Erie Railroad which is under my jurisdiction, and in a general way, I am familiar with the terminal services
327 as performed at this plant. The Erie Railroad performs the terminal services on a so-called pooled power basis for itself, Pennsylvania, and New York Central, and also acts as agent for the Pittsburgh & Lake Erie. Insofar as terminal services are concerned, there is nothing different in its relation to the Pittsburgh & Lake

Erie in performance of those services from the other two lines. The terminal service at the Farrell plant is exactly the same as I described for the Brier Hill plant of the Youngstown Sheet and Tube Company.

The Erie, Pittsburgh & Lake Erie, and New York Central cars are handled by our engine between the industry and the base yard, but the Pennsylvania R. R. sets its cars on designated tracks at the industry. The industry requires at Farrell anywhere from four to eight hours' services per day to complete the work for all railroads, and the switching program is so arranged as to meet the requirements of the industry and the railroads both.

The Erie, New York Central, and Pittsburgh & Lake Erie all use the same yard, and I do not know of any instance where the industry has not accepted all cars that came in for them. Unfortunately they are not getting very many, and can handle all of them very easily. If the industry so requested, we might hold cars out until ordered in by the industry.

As to whether the factors of interruption and interference, as described in the rules that govern the determination of allowances—meaning factors of time that are charged against the industry in figuring out the allowance—are also taken into consideration by the Erie Railroad in circumstances where the power of that rail-
328 road performs the spotting service, as in the case of this Farrell plant, regardless of what interference or interruption there might be to the joint switch engine in the Farrell plant, the time of the engine engaged wholly within the plant is charged to a joint account, and the cost of the service, including engine service and crews' wages, are apportioned among the roads for which the Erie performs the service on the basis that the loaded cars handled for each line bear to the total. That amount goes into the operating expenses of each respective railroad. The Erie engine performs the intra-plant service, if there is any, at the Farrell plant, for account of the railroad in whose per diem account the particular car might be included at the time the service is performed.

The Farrell plant is the only plant of the American Sheet and Tin Plate Company where the Erie performs that intra-plant service (T. 10479–10482).

F. J. PERRY, of the Pennsylvania Railroad, was recalled and testified as follows (Vol. 10, p. 10483):

DIRECT EXAMINATION

The Shenango plant of the American Sheet and Tin Plate Company is located just south of New Castle, between the Pennsylvania and the Erie railroads. The Shenango River is next to the Erie Railroad. We do the work jointly in that plant for the Pennsylvania and the Pittsburgh & Lake Erie roads. We have designated tracks where the Pittsburgh & Lake Erie brings cars in, and we have a track right outside the fence designated as our track; and then

the joint engine can reach those tracks just as the industry wants, whatever we have for them. The practice of the railroads for their own convenience is to bring cars down from the train yards to
329 these locations just described, and there they are set out pending disposition or instructions received from the industry as to the taking of them into the plant and spotting them at particular locations. At the time of this hearing I believe the mill is working about 75 percent of the time, and we have one eight-hour crew, and another crew which works about two hours. We put the second crew in and take them out just as quickly as they are done. That engine performs the intraplant service as well, on regular Keystone or switching orders from the industry (T. 10482–10485).

J. L. O'TOOLE, of the Pittsburgh & Lake Erie, was recalled and testified as follows (Vol. 10, p. 10485):

DIRECT EXAMINATION

The Monessen plant of the American Sheet and Tin Plate Company is on that part of the Pittsburgh & Lake Erie that comes within my jurisdiction, and in a general way I am familiar with the terminal services rendered there. The Pittsburgh & Lake Erie is the only carrier serving that plant and it is required to spot inbound loads at the point of unloading and place empty cars at the points of loading within the plant, as well as perform such intraplant service as may be required. As to whether the work performed by the Pittsburgh & Lake Erie is performed under the direction of, and at times required by the industry, or on railroad schedule, it is a question of cooperation as between the local yardmaster and the representatives of the plant. When the P. & L. E. brings traffic into Monessen for the American Sheet & Tin Plate Company we set it out in the train yard. It is the general practice in every industrial community for the yardmaster to apprize the plant people what has arrived, and they will tell him what cars to deliver. That is necessary to avoid lost action on the part of the carrier's engine.
330 They may have a surplus of one given kind of commodity, such as coal, for example, in excess of the requirements for any given day. That may hold true of other materials as well.

At the time of this hearing when the industry tells the carrier what commodities and the number of cars of a particular commodity to bring in, those instructions relate to the next regular scheduled trip of the engine between the yard and the industry. With a more normal business condition it might be that we would have an engine assigned to the plant. That plant engine then—we call it a plant engine—would handle from a designated track right adjacent to the plant, and a general yard engine would handle between the train yard and that track. This adjacent track may be described as an auxiliary yard in which we transfer our cars from the train yard and there hold them. In that instance, that would be for our own practical operating convenience. That practice would exist at this

Monessen plant in normal times. Generally speaking, the subsequent movement, or the movement from that so-called auxiliary yard to locations for loading and unloading on the tracks of the industry, would be something more directly controlled by the industry and would be performed at times and quantities of cars as directed by the industry. That would include the weighing of the cars to the extent the industry wants them weighed. Our power at the Monessen plant performs the intraplant service also, when called upon to do so, under the tariff provision. When we notify the industry of the arrival of the cars, and they don't take delivery, the cars are under constructive placement, under the demurrage tariff (T.10485–10488).

331 *Narrative statement of general testimony*

332 RICHARD VAN UMMERSEN, with the Boston and Albany Railroad, was called as a witness and having been first duly sworn, testified as follows (Vol. 1, pp. 119, 130):

DIRECT EXAMINATION

In answer to the question just asked the previous witness with respect to demurrage charges assessed under the demurrage tariff on cars assigned to New England Fuel & Coke Company, the freight tariff begins at the interchange yard that was indicated by the trainmaster. The average agreement applies to many of the industries within that plant (119).

FREDERICK F. WILLIAMS, recalled, having been previously sworn, testified as follows:

The Coke Works, the Domestic Iron Works, the Beacon Oil Company, and the American Bitumulus Company are served by the New England Fuel & Transportation Company, which is the present name of the Gas & Coke Works (119).

There are no other industries in the Boston district having locomotives doing their internal switching (130).

RICHARD VAN UMMERSEN (recalled):

333 All of the industries in that plant, with the exception of the American Bitumulus and the New England Fuel Transportation Company, are all on the uniform average agreement and free time begins to run from 7:00 a. m. after placement on the interchange track, until brought back to the interchange track.

Cars placed on the interchange track have been delivered for all line-haul purposes. We consider the wording of Rule 3 of the demurrage code on cars to be delivered on interchange track, serving an industrial plant, where the industry does the switching with its own power—as having been delivered in so far as line-haul rates are concerned when placed on such interchange track.

We make no allowance on the Boston and Albany, in any case, where the industry does the spotting service with its own power beyond the interchange track. There is one exception, however, and that is the Chapman Valve Company. At industries other
334 than the 10 that we will mention, we do the switching within the plants on our railroad.

Our construction of the matter is that when cars have been placed on the interchange track, that car has been delivered for all intents and purposes under the line-haul rate, and if we were to grant an allowance to the industry for performing the spotting service beyond the interchange track, that would be an improper allowance—at this time we make no allowance, and when we consider they are line-haul, transportation ceases at these interchange points on the two plants in question.

If the Cochrane Chemical Company or the Merrimac Chemical Company did not have its own locomotive, our line-haul rate would include delivery on track within the plant. As to whether at the Merrimac Chemical Company plant the railroad company did do the switching at that plant before they obtained their own locomotives—I know they have had a locomotive over there for a great many years. A chemical plant does not like to have a railroad come in its plant.

The Merrimac Company makes final delivery of some products all over its plant. If they did not have any locomotive to do the spotting we might make delivery within the plant under the line-haul rate. If the industry desires to have an interchange point, and they voluntarily at their convenience do the work beyond that interchange point, that is up to them. Our line-haul rate contemplates delivery or receipt at all of our team tracks, stations, and industrial sidings. At this particular plant our line-haul rate contemplates delivery at the interchange point. Our line-haul rate stops when we put the car on track No. 3 or No. 51.

335 As to whether our obligation would include spotting within the plant without an additional charge, if the Merrimac Company had no locomotive of their own—that would make, as we do in many side tracks, delivery within the plant and spot the cars, if the physical lay out of this plant was such that we could perform the service. Our line-haul rate would not contemplate delivery within the confines of a complex plant operation such as the Merrimac Company (130 to 133).

If the industry desires to have for their convenience this interchange made at this particular point, then we consider that our rate ceases at that point. If the industry considered that they wanted delivery made within the plant, we might make the delivery for them under the line-haul rate—we hold ourselves to make delivery to and from these side tracks—always have.

We have other industries on our line where we are actually making these deliveries but in this particular case the industry has elected to supply an engine and perform their own switching service and we make delivery to them on the interchange track.

Mr. FERNALD. (Attorney for Boston & Albany Railroad.) To clarify the record, our position is this, that if any industry says they want their interchange made on a particular track, that is their specification of the point where they want their car spotted. Now, if they have their own motive power and want to go beyond that point with their own power, that is their own internal arrangement and that we cannot interfere with.

336 In every case where the cars have been placed on an interchange track where the industry does the switching with its own power, under those conditions, the line-haul rate terminates upon delivery at the interchange track, but if the industry gives up its motive power and says we want the car spotted within reasonable limits, we would have to spot the cars as for any other industry. That is my personal opinion, and I have always felt allowances were improper, notwithstanding the fact that Section 15–(13) of the Interstate Commerce Act says shippers shall be compensated for services which they render for the carriers, because in the case of the Boston and Albany Railroad we hold ourselves down to certain services. If the industry does not want us to do it, it is like the man says, "I will take public delivery" (134 and 135).

The WITNESS. Exhibit No. 30 is an arrangement that permits the motive power of the Boston and Albany on the tracks of the New England Fuel and Transportation Company to deliver and receive freight from that industry in its interchange yard. The Boston and Albany pays nothing for the use of their tracks. The Transportation Company maintains the tracks and the Boston and Albany assumes its own expenses of conducting the switching. No allowance is made by the Boston and Albany to the Transportation Company for service performed beyond the interchange at the pond. There is no obligation on the part of the Boston and Albany to go beyond the interchange track under our present arrangement. The Boston and Albany could not move that interchange track any where it cares to in accordance with the convenience of the industry. This is an interchange track established by the consignee and is located on industry property. We look upon that interchange track

337 as equivalent to any ordinary side track. The distance from the interchange track and the Boston and Albany's right-of-way—from the switch points down into the clearance point is about 1,600 to 1,800 feet. These yard tracks would be about 1,000 or 1,200 feet in length from ladder to ladder.

In reference to the Merrimac Chemical Company's Exhibit No. 31, the distance from 51 to the cross-over track is approximately 700 feet.

REDIRECT EXAMINATION

The Boston rate includes East Boston—all rates within the Boston switching limits. East Boston is about five miles further from the break-up yard than this plant, so that delivery at the public delivery yard at East Boston would necessitate a somewhat longer haul than

to the point of the New England Fuel and Transportation Company (135 to 137).

338 Mr. HAGERTY (counsel for the Interstate Commerce Commission). I have no questions but, in reference to the last two industries, I would like to have the record clearly show, as a matter of classification of the service, that these are two industries in reference to which the respondent carriers are permitted to enter the gate of the industrial plant, move the cars for delivery to a certain designated system of tracks inside of the plant, and to pick up outbound cars on the same tracks. The limit of the service within the plant track, as I understood the testimony, is fixed by the industry, not by the respondent carrier, but the respondent carriers if called upon to do so, would, under their line haul rates, make the spotting or spot the cars at the different locations within the industrial plants. Now, if I am mistaken in that understanding, I would be glad to have the respondents' witnesses clear it up. I state that merely for the purpose of the classification of the different kinds of service. We have this same kind of service at different places throughout the country, I expect, and these two industries, I take it, would fall within that group. I have no other questions to ask, if that is the correct understanding of the testimony as given (147).

Director BARTEL. Will counsel reply to Mr. Hagerty?

Mr. FERNALD. I would like to make the modification that in case of the coke tracks, so-called, there are a series of tracks that are used; that there is no one track that is limited to delivery or receipt. As Mr. Williams explained, the train would pull in one of ten tracks. If that track was not long enough for delivery, they would have to pull ahead and back in on another track. The outbound would be taken on tracks further over. They are not limited to any one track. There is a yard on which receipt and delivery is made, and any one of those tracks may be used as the case demands (147–8).

RICHARD VAN UMMERSEN (recalled) testified as follows:

As we previously stated our line-haul rates apply to and from public delivery tracks, freight stations, and industrial sidings, except that to and from industrial sidings on less than carload freight line-haul rate would only apply when the cars contain 4,000 pounds or more (175).

339 J. R. MACANANNY, Assistant Freight Traffic Manager of the Boston & Maine Railroad, was called as a witness, being first duly sworn, testified as follows (Volume 1, page 201):

On carload freight, our line haul rates include the placement of the empty car for loading on public or private tracks, the switching of the loaded car from such tracks to our make-up yard, the switching of the loaded car from the break-up yard at destination to and including placement on public or private tracks and the switching of the empty car therefrom (201).

On less-than-carload freight, our line haul rates include the loading and unloading through the freight house and, on shipments of 4,000

pounds or over, the placement of the empty car for loading on public or private tracks, the switching of the loaded car from such tracks to our make-up yard or transfer, the switching of the loaded car from the break-up yard or transfer at destination to and including placement on public or private tracks and the switching of the empty car therefrom. We also reserve the right to perform this letter service with highway vehicles in lieu of freight cars (202).

We do not make any allowances to industries switching their own freight except to the Berlin Mills Railway at Berlin, N. H., which arrangement was ordered by the Interstate Commerce Commission in 63 I. C. C. 313. This absorption is contained in Item No. 250 of our tariff, I. C. C. A–2595 (203).

Mr. KEELER (counsel for New England Fuel & Transportation Co.). As I stated yesterday, it would be our purpose to put in a statement on behalf of the New England Fuel & Transportation Company after hearing the witnesses for the Boston & Maine and Boston & Albany railroads (241).

The witnesses for the railroads have stated the names of the companies which are served through the facilities of the New England Fuel & Transportation Company (242).

The cars consigned to or from these companies are taken by the facilities of the New England Fuel & Transportation Company to or from the tracks immediately serving these other industries. There are also certain other services performed by the New England Fuel & Transportation Company for these other industries, and there are contracts existing between these companies and the New England Fuel & Transportation Company under which certain charges are made for these various services.

340

Director BARTEL. Let me see if I understand. Your charges are made by the New England Fuel & Transportation Company for performing these spotting services for the various industries.

Mr. KEELER. The spotting services and certain other transportation services which are rendered by the New England Fuel & Transportation Company.

The New England Fuel & Transportation Company makes certain charges against these other companies for the services which they render.

Director BARTEL. I wonder what is back of the fact that the Fuel Company is willing to perform these services, you might say, really for and on behalf of the railroad, gratis (242)?

Mr. KEELER. Well, I will say this, Mr. Director, that neither the New England Fuel & Transportation Company nor the other companies which are served through the New England Fuel & Transportation Company are satisfied with the existing arrangement (243).

They feel that there are certain services performed by the New England Fuel & Transportation Company which the New England Fuel & Transportation Company or these other companies have to bear the expense of, and that those services are covered by the line

haul rates of the Trunk Lines—that is, the Boston & Albany and Boston & Maine (243).

I want to make that statement, because I do not want this record to indicate that either the New England Fuel & Transportation Company or the other companies which it serves are satisfied with the existing arrangement, or believe that they are receiving from the trunk lines all of the services which they should receive under the line haul rates (243).

I also want to make that statement because we do not want any inference drawn from the situation which exists at the New England Fuel & Transportation Company, that the arrangements there are as they should be, or should be used as a test by which to judge the terminal service rendered at other industries or at other points where allowances are made (243).

Director BARTEL. The situation existing there is, to say the least, pretty novel, at least to me (243).

341 Mr. HAGERTY. Have you on your line of railroad any industries served by the Boston & Maine where the industries themselves had systems of plant tracks on which your locomotives enter on the track and do the spotting service (281)?

Mr. COLE (counsel for Boston & Maine Railroad). Yes, sir.

Mr. HAGERTY. We have not had any of those typical instances, and we would like to have some of them if you can give them to us before we close (281).

A. H. FAIRFIELD, Special Assistant to the Vice President of the New York, New Haven & Hartford Railroad Company, was called as a witness, and being duly sworn, testified in part as follows:

Map No. 15, I. C. C. 2922—American Steel & Wire Company, Worcester, Mass. This concern has three plants in Worcester, the South Works, located approximately two miles south of our classification yard on the east side of our Worcester-Providence main line; the Central Works, located about one half mile south of our classification yard on the west side of the Worcester-Providence main line; and the North Works, located on the B. & M. side about two miles east of the New Haven Railroad Classification Yard (505).

At the South Works all spotting of the cars within the plant is performed by the Wire Company. There are two interchange points at the South Works, one of two tracks at the south end of the plant and one at the north end of the plant. The New Haven Railroad places cars on and takes care from these interchange tracks (505–6).

All the switching at the Central Works is performed by our Worcester Yard switcher.

The North Works has two sub-divisions. At the north end of the North Works, the Worcester Yard switcher does all the switching. At the lower end of the North Works cars are delivered to and taken from an interchange track, located on land of the Wire Company, and the switching in the plant is performed by the Wire Company's electric locomotive operating on a narrow gauge

inside of the side tracks. The business in July 1931 was:
342 South Works—487 loads received—373 loads forwarded; Central Works—55 loads received—50 loads forwarded; North Works—126 loads received—196 loads forwarded (506).

In some sections of this plant the New Haven switch engine performs the plant service, and at other parts of the plant the power of the industrial company performs the same identical service (506).

Q. Why do you go in the plant at all, inasmuch as you don't apparently have to do that service under your line haul rate, where you don't do it? You don't do it at most of all these other places you have described. Your service stops as shown at the inside of the plant, or rather at the gate of the plant. Why is it with reference to the American Steel & Wire Company you depart from that general practice and enter in upon the industrial track with your switches (507)?

A. I don't think it is our departure. Of course, if any industrial plant wants us to place cars, we will place them. I understand that is our obligation. Now, they selected to do certain of their work in certain plants. If there was a change, presumably where we had to do certain spotting, if you will, we would have to do it (507).

By Mr. HAGERTY:

Q. With reference to all of the industries you have described up to the point of reaching the American Steel & Wire Company, No. 2922, I am to understand from your testimony that those industrial plants do not wish—do not ask the New Haven to enter upon their industrial tracks?

A. That is right.

Q. And perform the spotting service, nor do they ask for an allowance, but if they asked for that service, to the extent that it was physically impossible for your engines to enter the industry and run over their tracks, you would perform that service at the line haul rate?

A. Yes, sir.

Q. That is a correct understanding, and the only reason you do not do it is because you have not been asked to do it?

A. That is right. That is coupled up, of course, with inside conditions, such as grades and curvatures and conditions (507).

343 Q. Yes; I base that upon the physical possibility at the American Steel & Wire Company's plant. The situation is no different, excepting that there the industry reserves to itself the privilege of performing certain parts of its service when it is convenient for it to do so, for which it receives no allowance or other compensation (508)?

A. That is right.

Q. And it calls upon your railroad to perform the remaining part of that service and you do it?

A. Yes; but, of course, it is a different line-up. When we do that switching, there are two tracks in the loading plant—within the plant that they selected to switch. It is mile after mile of their

own tracks at various locations. It is an entirely different type of plant.

Q. I asked this question of your traffic manager, I assume that in these instances, taking as illustrative the plant now under description by the witness, the American Steel & Wire plant, that the rates—the application of them includes the service to any point within the plan. That is your interpretation of your rate and your tariff obligation (508)?

Mr. POVELEITE (Asst. to the General Traffic Manager, New York, New Haven & Hartford R. R.). We have always understood so.

344 M. V. BECKSTEDT, General Freight Agent, Delaware & Hudson Corporation, was called as a witness, being first duly sworn, testified as follows (Vol. 1, p. 629):

DIRECT EXAMINATION

I have been an employee in the freight department of the Delaware & Hudson for 24 years and a general officer for approximately 10 years and I am familiar with the case of the International Paper Company against the Railroads reported in 146 I. C. C. 559. In that case, the carrier put in very detailed information as to just what was done for that plant, including the number of cars placed on the spur, the entire operation and the number of cars handled. The extent of the service performed was pointed out as justifying the existing rates. The case covered the rates on bituminous coal from the various bituminous regions to Corinth. However, the rates were ordered reduced. The rate ordered was the same as Glen Falls, which also is on a branch, but the same rate also applied to some main line points farther north.

Montgomery-Ward & Company consulted with the officers of the Delaware & Hudson prior to the location of their plant at Albany. The side track facilities were laid out in accordance with the plans drawn by our engineering department, in conjunction with representatives of the plant, and they altered their plans to agree with that layout. The purpose of that was to get efficient operation and so far it has proved very satisfactory.

The general practice with regard to demurrage at the International Paper Company is that the 48 hours free time commences with the next 7 a. m. after arrival notice is given them; at the expiration of that period demurrage starts.

345 The conductor brings the bills when he reaches the station and the agent takes the bills and phones down to the International Paper Company. When the cars arrive at the plant they have a switching list ready. "Put the pulpwood so and so" (T. 631).

All our terminal charges and accessorial charges are contained in one tariff, I. C. C. No. 13870. Generally speaking, the rate applica-

tion and general terminal charges applied under Delaware & Hudson Railroad tariffs covering the services on traffic other than coal and coke which have been described by the previous witnesses are as follows (T. 632):

On carload traffic, the line-haul rate includes the original spotting of the car on consignee's or shipper's private siding or on a public delivery track and no additional charge is made for such service. If, however, consignee or shipper requires a second spotting of the car, an additional charge for such service is collected, based on rate of 33 cents per ton net or gross, as the case may be, minimum charge $6.30 per car (T. 629–632).

As I understand the situation at the General Electric plant what is done there is not actual spotting. The cars are interchanged on an interchange track. While the engine is there if there is a car just inside the gate which they would like to get out, they will ask us to take it out and the engine will get it, but they have a very complicated system of tracks and our engines could not go in without a pilot so actual spotting within the plant is not done and there is no instance where after putting a car on the interchange track they take it off and take it in. If it did happen, a charge would be applied (T. 632). They go in there for any purpose very rarely, I don't know that they do it more than once a year (T. 632).

346 In the cases where the terminal switching service is performed by the industry with its own locomotives, and the traffic is interchanged on an interchange track, the Delaware & Hudson does not in any case make an allowance to the industry for such service. We give them notice and when the car is placed
347 on the interchange track, we regard it as delivered. The railroad then considers that it has performed all the service which it is obligated to perform under the line-haul rate.

In the case of the Clarendon & Pittsford Railroad, through rates are published from and to the stations which it serves and divisional arrangements are in effect which provide that the Clarendon & Pittsford Railroad will receive arbitraries out of such through rates ranging from 1.2 cents carloads and 3 cents less carloads to 2½ cents carloads and 5 cents less carloads per 100 pounds, depending on the origin point and destination.

In the case of the Lake Champlain and Moriah Railroad, to which reference has been previously made, we do not publish any through rates or participate in any through rates with this railroad, the cars being handled on an interchange track and being waybilled to and from Port Henry as though they originated at Port Henry.

We do not bill for any advance charges on the cars. In other words, we have nothing to do with the charges that are assessed by the Lake Champlain and Moriah Railroad. The majority of the traffic is iron ore outbound. The charges on that are paid by the shipper before they are delivered to us, and we have nothing to do with it. We make no allowance out of the line haul rate.

In order to make clear just what the Clarendon & Pittsford Railroad does, I might mention that they have four stations which are local to them, and two stations which are joint with other lines, and they carry on a considerable common carrier traffic in addition to their marble traffic, although the marble business is the majority of the traffic. They also interchange with the Rutland Railroad (T. 635–637).

348 CROSS-EXAMINATION

The Lake Champlain & Moriah R. R. maintains service today to Mineville and continues directly over the D. & H. to blast furnaces in eastern Pennsylvania and New York. They also handle ore for blast furnaces at Port Henry. This ore is handled in standard equipment which is furnished by the D. & H. Some of the ore is shipped by water but not a large percentage. The rates on iron ore from Port Henry have been made to some extent to meet this water competition from Port Henry. We had through rates back in 1905 but they were withdrawn. The water influence has affected the measure of the rate from Port Henry on both iron ore and pig iron.

I am not in a position to say whether the Clarendon & Pittsford Railroad is entirely owned by the Vermont Marble Company. They are the only marble shippers located on that railroad. We have a large marble shipper on our railroad at West Rutland. We maintain a group system of rates on that commodity. There are also some on the Rutland Railroad and they are all contained in one group. If we were to cancel the joint through rates in connection with this little railroad, the shippers of marble on that railroad would be at a disadvantage in competing with others in that group. The present basis of making rates is equitable to the shippers of marble in that particular group.

There is a marble operation at West Rutland where they have their own side track and which we serve in the usual manner. They do not provide their own locomotive. We have to perform the service, but don't have to pay anything out of the freight rate. At one time we did have through rates with the L. C. & M. and they were withdrawn at their own request (T. 637–639).

349 As to the charge for the service to the paper plant or other business in the rates to or from Corinth, it has been included continually since the time the line from Saratoga to North Creek became a part of the D. & H. At one time it was a separate railroad and then there was a separate charge made by them. That is not done now. The Adirondack Railroad has been a part of the system for 50 years.

In the International Paper Company case we put in testimony calculated to sustain the reasonableness of the rates then maintained. We did not, however, put in any cost. We gave the details of the terminal service.

As to that particular plant, without reference to the general situation, I would say that in my judgment a charge in addition to the line haul rate should not be made for that character of service that is given at that plant off our railroad. If you are considering, should a charge be applied to all such industries, that is another proposition. I don't think you ought to pick out any one particular plant, and say, "Should you have a charge" (T. 641–644)?

350 The question of terminal charge at an industry—for spotting on an industry side-track—is one which I think should be covered by the line haul rates, because I don't see how you could put a charge on one industry, that is, a private track, and not on another one. You have industries of all character and size, and all kinds of business. If you undertake to separate it and put a charge on that industry and not put it on all, I don't think it would be fair. If you put it on all, you are going to hurt the railroad business, as I see it, because these side-tracks are an asset to the railroad. You take an industry that comes to locate on your railroad. He wants a small track, maybe two or three hundred feet, and he is willing to pay for it. That means that your own facilities are not taxed to the extent necessary to serve that industry. When he spends that money to put his track in there, and the ordinary service is given to him, the same as you give to anyone else, why should you then go to him and say, "In addition to that, we are going to charge you one, two, three, or five dollars per car for this service?" He is liable to say, "Well, take your side-track and throw it in the river, and we will truck from the station."

As to the question of sidings I think they are a substitute for team-track service and that no charge should be made.

Q. If the General Electric Company suddenly said today that "We will no longer perform the service within our intricate system of plant tracks, and feel that that service is included with the rates, and we will ask the railroad to perform the service" would you then feel a charge ought to be made in addition to the rate for that kind of terminal service?

351 A. No, I would not say that. If they are satisfied with the service that the railroad is giving under their one spotting arrangement and one switching, there is no reason why that should not be given. They are not satisfied with that. They want frequent service, and they want to handle the cars from and to their spotting, and, therefore, they can't get along with the railroad service. There is no reason why we shouldn't give them one spot if they are satisfied. That is ordinarily given in connection with the line haul (T. 644–645).

That is the situation at the paper plant. We make one spot which we feel is all we are obligated to do. We feel that all those things should be taken into consideration in making the level of the line-haul rates. If any industry grows so that it will be necessary to have more tracks and longer tracks, I do not feel that that should be a reason for an additional charge for placing the cars for loading

or unloading so long as they are satisfied with the service that is ordinarily given. It is more economical for us to spot a longer string of cars and the more freight we receive the more money we are able to make.

I would like to say something about cases where we have industries on team tracks. At Cobleskill the Harder Silo Company wanted to locate just at the end of a team track. We extended the team track into that plant. The track is partly on our right of way and partly on their property. We give those people preference on that particular track. They paid for it and maintain it, but it is part of our team track, and we can use it provided we can do it without disturbing his operations.

As to whether we also have a longer track which runs alongside of various other industries where we give store door delivery, we have instances of this kind, where we happen to own a potato warehouse—there is a potato warehouse, whether we own it or
352 not—that is alongside the team track. We make the owner of that warehouse pay for the maintenance of the track. In return for that, he gets cars spotted there. Ordinary freight could not be unloaded on the same side, but the other side is usually reached by a roadway, and when that track is not in use by the owner of the warehouse, it is open to the public, and is so used. These cases are rare. If a car has to be withheld from the potato warehouse, they would get their car within a reasonable length of time and it would not affect the demurrage (T. 645–646).

By Mr. HAGERTY:

The Commission some years ago in a case entitled Railroad Commissioners of Florida versus the Florida East Coast Railroad, 42 I. C. C. 616, had a circumstance described where that railroad, that is, the Florida East Coast, had imposed a terminal charge in addition to the line haul rate for what was described as the spotting service. That service was defined as a service that was rendered to meet the particular convenience of a consignee or shipper by spotting the car at a particular location, either on the public teamtrack or on a private siding, as distinguished from instances where the carrier, at its convenience, would place the car at any spot available. Now, let me inquire, first, if you know of any such services on the D. & H. where shippers require these cars to be placed upon the public teamtracks at particular spots selected by them, as distinguished by the spots that may be adjacent to their railroad, and apply that question both as to the public teamtrack and the ordinary or usual industrial siding.

There are no instances except those I previously mentioned where the shipper has undertaken to sign an agreement in connection
353 with part of the track. In those circumstances that track becomes, in effect, a private station. In those cases we place it where he wants it, but not on public tracks for public business.

I do not think a charge should be made for that. It is all within the line haul rate.

354 There are no instances that I can think of where the charges assessed for terminal service within the scope of this proceeding are inadequate. I think there are lots of cases where the line-haul rates may well be increased, to cover not only the 355 terminal but all other expenses (T. 646–657). But I do not recall and do not know of any particular instance where our terminal services are of such size that compensation which is included in the rate or charged separately is inadequate. If there were such instances they would be brought to my attention and I would know about them (T. 652).

Delaware, Lackawanna and Western Railroad

MAURICE WILLIAMS, General Freight Agent, Delaware, Lackawanna and Western Railroad Company, was called as a witness, being first duly sworn, testified in part as follows (Vol. 1, p. 655):

On carload freight, the line haul rates include the placement of loaded car on public team tracks or private tracks for unloading and the switching of the empty car therefrom; the placement of empty car on public team track or private track for loading and the switching of the loaded car therefrom.

On less than carload freight the line haul rate includes loading and unloading through freight houses and on shipments of 2,500 lbs. and over, the placement of cars on private tracks for loading and unloading by consignees (D. L. & W. Tariff I. C. C. 22860).

We make terminal switching allowances to the following industries engaged in the iron and steel industry:

Republic Steel Corp., Buffalo, N. Y., 90¢ per loaded car.

Hanna Furnace Co., Buffalo, N. Y., 90¢ per loaded car. Tariff Authority, I. C. C. 22674.

Wickwire Spencer Steel Corp., Harriet, N. Y., 71¢ per loaded car. Tariff Authority, I. C. C. 18325.

American Bridge Co., Elmira Hts., N. Y., 61¢ per loaded car. Tariff Authority, I. C. C. 22244.

Wickware Bros., Cortland, N. Y., 1.10 per loaded car. Tariff Authority, I. C. C. 21949.

Warren Foundry & Pipe Co., Phillipsburg, N. J., 80¢ per loaded car. Tariff Authority, I. C. C. 22645.

356 E. B. MOFFATT, General Superintendent, Delaware, Lackawanna and Western Railroad, was called as a witness, being first duly sworn, testified as follows (Vol. 1, p. 658):

DIRECT EXAMINATION

I am General Superintendent of the Delaware, Lackawanna and Western Railroad, and have prepared a statement with reference to the operations incident to terminal deliveries on this railroad.

In order to cover the various industries served by the Lackawanna and the scope of the Commission's investigation, we have made a separation under the following general heading:

(1) Industrial and short line common carriers, which include: South Buffalo Railway, Genesee and Wyoming Railway, West Pittston and Exeter Railroad, Pohatcong Railroad, Northampton and Bath Railroad, Wharton and Northern Railroad, Mt. Hope Mineral Railroad.

(2)–A. Industries having a system of tracks where they perform their own service to and from designated interchange tracks and are given so-called industrial plant facility allowance. These include:

357 Republic Steel Corporation, Buffalo, New York.
Wickwire Spencer Steel Corporation, Buffalo, New York.
Hanna Furnace Corporation, Buffalo, New York.
Wickwire Brothers, Inc., Cortland, New York.
American Bridge Company, Elmira Heights, New York.
Warren Foundry & Pipe Company, Phillipsburg, New Jersey.

(2)–B. Industries having a system of tracks where they perform their own service to and from designated interchange tracks and are not given industrial plant facility allowance. These include:

Donner Hanna Coke Company, Buffalo, New York.
Symington Company (Gould), Depew, New York.
Solvay Company, Syracuse, New York.
Solvay Company, Jamesville, New York.
Crucible Steel Company (Halcomb), Syracuse, New York.
Columbia Mills, Minetto, New York.
American Car and Foundry Company, Berwick, Pennsylvania.
Ingersoll Rand Company, Phillipsburg, New Jersey.
358 Triplex Glass Company, Passiac, New Jersey.
Seaboard By-Products Company, Seaboard, New Jersey.
Worthington Pump & Machinery Company, Harrison, New Jersey.
Crocker Wheeler Company, Ampere, New Jersey.

(2)–C. Industries having a system of tracks where the railroad company performs the spotting service. The names and locations of these industries are shown as follows:

Colonial Radio Company (King Sewing Machine), Black Rock, New York.
American Terminal Warehouse, Black Rock, New York.
Taylor & Crate Lumber Company, Black Rock, New York.
Buffalo Crushed Stone Company, Black Rock, New York.
Hurd Brothers Lumber Company, Buffalo, New York.
Lancaster Malleables & Steel Corporation, Lancaster, New York.
Thatcher Manufacturing Company, Elmira, New York.
Elmira Water, Light & Railroad Company, Elmira, New York.
Morse Chain Company, Morchain, New York.
Endicott-Johnson Corporation, Johnson City, New York.
Danville Iron & Steel Corporation, Danville, Pennsylvania.
359 Danville Structural Steel Company, Danville, Pennsylvania.

Danville Stove Works, Danville, Pennsylvania.
Reading Iron Company, Danville, Pennsylvania.
Wyoming Shovel Works, Wyoming, Pennsylvania.
Alan Wood Mining Company, Oxford Furnace, New Jersey.
Penn-Dixie Cement Corporation, No. 6, Bath, New York.
Penn-Dixie Cement Corporation, No. 4, Nazareth, Pennsylvania.
Lone Star Cement Company, Nazareth, Pensylvania.
Nazareth Cement Company, Nazareth, Pennsylvania.
Hercules Cement Corporation, Belfast Junction, Pennsylvania.
Alpha Portland Cement Company, Martins Creek, Pennsylvania.
Alpha Portland Cement Company, Jamesville, New York.
Brown Lipe Chapin Company, Syracuse, New York.
John Feere Plow Company, Syracuse, New York.
H. H. Franklin Manufacturing Company, Syracuse, New York.
Paragon Plaster Company, Syracuse, New York.
Straight Line Engine Company, Syracuse, New York.
360 Wilson & Greene Lumber Company, Syracuse, New York.
Utica Willowvale Bleachery Company, Chadwick, New York.
Bossert Corporation, Utica, New York.
Utica Knitting Company, Utica, New York.
Washburn-Williams Company, Scranton, Pennsylvania.
Scranton Lace Company, Scranton, Pennsylvania.
Paragon Plaster Company, Scranton, Pennsylvania.
Maloney Oil & Manufacturing Company, Scranton, Pennsylvania.
Luther Keller, Scranton, Pennsylvania.
Finch Manufacturing Company, Scranton, Pennsylvania.
International Boiler Works, Stroudsburg, Pennsylvania.
Edison Portland Cement Company, New Village, New Jersey.
Morris County Crushed Stone Company, Millington, New Jersey.
Paterson Bridge Company, Paterson, New Jersey.
Robins Conveying Belt Company, Passaic, New Jersey.
Richardson & Boynton Company, Dover, New Jersey.
Swift & Company, Harrison, New Jersey.
361 (3) Ordinary sidings and spurs:
Westinghouse Electric & Mfg. Company, Newark, New Jersey.
Radio Corporation of America, Harrison, New Jersey.

This type of service covers practically all industries served by the Railroad Company which are not included under No. 1 or 2-A-B or C, and are listed in the Lackawanna Railroad Official Shippers Directory of 1930.

A copy of the Lackawanna Railroad Official Shippers Directory of 1930 was received in evidence and marked "Carriers' Exhibit 77, Witness Moffatt."

I would like to call attention to the fact that American Car & Foundry Company, Depew, New York; Pequest Company, near Oxford Furnace, New Jersey, and Singer Manufacturing Company (Musconetong Iron Works), Netcong, New Jersey, are out of busi-

ness; furthermore, no traffic is interchanged with Grassy Island Railroad, Jessup, Pennsylvania, or Ferromonte Railroad, Kembil, New Jersey. The above mentioned industries and carriers were listed in a statement appended to Director of Service Bartel's letter of August 25, 1931, addressed to the Vice President and General Counsel of the Delaware, Lackawanna and Western Railroad. All of the industries listed will be included in my statements to follow. In my classification, three or more tracks are called a system (T. 658–662).

362 The Republic Steel Corporation, formerly known as the Donner Steel Company, located adjacent to our Abbott road yard, Buffalo, is served by the South Buffalo and Buffalo, Rochester & Pittsburgh Railroads as well as the Lackawanna. Two interchange tracks, one receiving and one delivering, capacity 15 cars each, are owned and maintained by the industry. The interchange tracks are switched four or five times in a 24-hour period, oftener if conditions warrant. Their locomotive power equipment consists of four gas-electric and three steam locomotives. Five or six locomotives are operated under normal business conditions. There are 133 standard gauge tracks with a total of 13.8 miles of track. Some tracks are of 23, 25, and 28 degree curvature, over which carriers power cannot operate and they have a subway underneath our right of way which carriers' smallest engines will not clear. When conditions are normal their business approximates 40 cars per day outbound and 60 cars per day inbound. The carriers make an allowance of 90¢ per car on roadhaul traffic, aggregating 10,000 or more per car. This industry has a terminal allowance of 90 cents per car with all railroads operating in Buffalo territory. It is under the average demurrage plan (667).

Wickwire-Spencer Steel Corporation, Harriet, New York, is on Wonalancet branch which is owned by New York Central and operated by New York Central for joint account of Lehigh Valley and Lackawanna. Cars for this branch are interchanged to the New York Central at Black Rock. Carriers make an allowance of 71 cents per car to this industry on cars handled in road haul movement containing 10,000 pounds or more of freight. It is our understanding an application made in 1928 for an increase in the terminal allowance was denied by the carriers (667).

The Hanna Furnace Corporation (Susquehanna Plant) at the southwestern boundary of the city of Buffalo is served by the South Buffalo Railway and the Pennsylvania Railroad; also by the Lehigh Valley under trackage arrangement with the Pennsylvania. The Pennsylvania provides on their property a delivery and receiving track for interchange purposes, each holding approximately 40 cars, located on property adjacent to this industry (668).

363 Traffic handled by the Lackawanna for the Hanna Furnace Corporation is interchanged between the Lackawanna, and the South Buffalo Railway or Pennsylvania Railroad performs the switching service for account of the Lackawanna. The Hanna Com-

pany serves no other industry and an allowance of 90 cents per car is made by carriers for road haul traffic, 10,000 pounds or more per car. Their business, when conditions are normal, amounts to 15 to 20 outbound cars per day and their incoming materials are practically all received by lake, except coke which is obtained locally (668).

The American Bridge Company is located at Elmira Heights, New York, 2.13 miles west of Elmira Yard. There are three interchange tracks, capacity 48 cars, for receipt and delivery of business to and from this plant on the property of and maintained by the D., L. & W. Railroad, adjacent to this industry. The track layout comprises 12 tracks, approximately 2 miles. They have one steam locomotive working nine hours per day. This industry is served by the Lackawanna, Erie, and Pennsylvania Railroads, all of whom make terminal allowance of 61 cents per car on revenue freight, 10,000 pounds or more. When conditions are normal their monthly business is about 100 carloads inbound and 150 carloads outbound via all lines. This company operates under average demurrage plan (669).

Wickwire Bros., Inc., Cortland, New York, operates a large steel mill covering about 50 acres, having 17 different switches and manufactures wire screen cloth, wire nails, rods, etc. Served by Lackawanna and Lehigh Valley Railroads. They perform their own switching with one locomotive, operating on a ten-hour shift. During August 1931, we delivered 45 cars and received 55 cars from Wickwire. The interchange is made at a point approximately one-half mile from the railroad main track, cars being placed just inside their gate by the railroad crew and outbound cars removed at the same point. They receive a switching allowance of $1.10 for each car containing more than 12,000 pounds. This company operates under
the average demurrage plan and cars are considered as
364 delivered to the Wickwire Company when placed at the designated point by Lackawanna power and as delivered to the Lackawanna when placed on the designated track by the Wickwire engine, accompanied by forwarding directions (669).

Warren Foundry and Pipe Company, Phillipsburg, N. J. This concern manufactures cast iron pipe, has track connection with the Lehigh Valley and Central Railroad of New Jersey, but no connection with the Delaware, Lackawanna & Western Railroad. Business to and from the Delaware, Lackawanna & Western Railroad is handled for our account by the Lehigh Valley Railroad at a cost of 18¢ per ton for handling from the Lehigh Valley Railroad interchange track to the Foundry Company. The Foundry Company does its own interplant switching, working one or two small engines and several locomotive cranes. The inbound movement via the Delaware, Lackawanna & Western Railroad is approximately 6 cars per month and the outbound movement 8 cars per month. Allowance is made by the carriers of 80¢ per loaded car (669–70).

CROSS-EXAMINATION

The industries listed under (2) A have their own power.
365 I do not know why industries listed under (2) A receive allowances for performing service, while those listed under (2) B do not. In the first group there are some industrial common carriers; in the second group are some industries which perform switching with their own power and which are plant facilities, and in some instances they receive allowances; the third group covers industries where the railroad performs spotting service.

Insofar as the industries grouped under (2) A are concerned, the freight rate includes the placement of cars on the track where they are required by the plant for delivery—that is, at the point where their engine takes them.

The roads listed are under the average agreement.

Rule 3 of the demurrage rules was read by the witness as follows: "Except as otherwise provided in Section B of Paragraph 1 of this rule, on cars to be delivered on interchange tracks of industrial plants performing the switching service for themselves or other parties, time will be computed from the first 7:00 a. m. after actual or constructive placement on such interchange tracks until returned to the same or another interchange track."

I do not know whether there is a written agreement with the industries to the effect that they would accept delivery on interchange tracks; we do have an agreement with them, however, where they accept placement of cars as constituting delivery; in other words, under Rule 3–E, cars which have been delivered on an interchange track by the Delaware, Lackawanna and Western Railroad are considered as a delivery to the industry.

366 There are, no doubt, a number of reasons which prompt certain industries to perform their own switching without an allowance. Now they, it seems to me, would be the people to say just why they do it, but the fact remains that they do it, in my judgment, to avoid interference from railroad switching operations in and around their plants, particularly where the plant is served by more than one railroad and where they require continuous interplant switching (692).

To my knowledge the Delaware, Lackawanna and Western Railroad has never refused to perform spotting in any plant which it was possible to enter from a physical operating point of view. I do not think that we would refuse if we were asked to place cars on a designated track within a plant.

In those instances where industries perform their own spotting without receiving an allowance, demurrage is computed from the time cars are placed upon their interchange track (T. 688–693).

Referring to that group of industries listed under (2) B, where an allowance is not paid, I would say that it was not possible for the Delaware, Lackawanna and Western Railroad engines to perform all of the services within the plant, nor would we want to perform

such services, but we could place cars upon a designated track within any plant.

I do not know all the physical characteristics of the plants that receive an allowance and those that do not. I do not know the reason for making these allowances. However, I would not want to perform all the switching within these plants for which we
367 make allowances, at the same price, or at the line haul rate, plus the allowance; if we were to receive an addition to the line-haul rate, the allowance we make the industries, I would not want to perform the service, and I certainly would not want to do it were we to receive nothing in addition to the line-haul rate. We cannot perform spotting within these plants as cheaply as the respective industries do.

Under group 1 are placed industrial short line common carriers. I cannot state exactly why they are called industrial common carriers, and that is the reason I inserted the words "short line." They all have not got the character of industrial work.

The South Buffalo Railway, which is a subsidiary of the Bethlehem Steel Company, brings us considerable traffic. The South Buffalo Railway serves other industries than the steel company, however, the greatest volume of traffic interchanged with the South Buffalo is for the Bethlehem Steel Company, although I do not know what that volume is.

Insofar as the operating services are concerned the interchange with such roads as the South Buffalo is exactly the same as with any Class I common carrier. On traffic for the South Buffalo Railway, we place it on the interchange track and they in turn take the cars from the interchange track and perform whatever service is necessary beyond that point. All I know with respect to operations
368 beyond the interchange is that the South Buffalo has several engines performing work in and around the plants of the various industries.

I assume that any industrial carrier or short line railroad serving an industry performs the same service for that industry that the Delaware, Lackawanna and Western performs for industry located on its railroad.

It is my understanding that allowances by us to industrial railroads cover the acceptance of cars by such industrial roads from us and the use of their lines in making ultimate delivery and which may or may not include spotting, although I presume the delivery does cover spotting.

As the industries listed under classification (2)–B as performing their own switching without receiving an allowance, under our practice, our delivery stops at the gate of the plant.

We cannot reach the Bethlehem Steel Company except by use of the South Buffalo Railroad. That railroad separates the industry from our line (T. 703–710).

In some instances we pay industries for performing the terminal service, such payment being either as a switching charge or a division of the through rates. The payment is either made direct to the

industry or through an industrial railroad. In other cases we make no payment to industries for performing spotting.

I do not know whether we make an allowance out of the line-haul rate to the railroads the same as we do to an industry (T. 712).

369 With respect to industries where we perform spotting service, at the present time there are very few instances where it becomes necessary for us to hold cars on our own tracks adjacent to the plant or somewhere out on the line awaiting the convenience of the industry to receive them. In fact, I cannot recall any specific case where we have had to hold a car. It might occasionally happen that we would, however, have to hold a car for an industry. If we were to go to an industry with a car and it was not ready for same, we would set the car aside and leave, and the next time the engine was in the vicinity of the industry in the course of its switching operations, it would place that car. As a rule, the engine that takes a car to a plant places it without any previous classification of the car.

Take the situation at Danville, Pennsylvania, where there are several industries and where we have a switch engine. Cars are handled in road-haul movement by two local freight crews and are set off in our yard on team tracks located in the vicinity of Danville. In the course of the usual operation, the switch engine picks up the cars for each industry and places them in the plants of the industries to which they are consigned. There is no classification yard at Danville, only a few tracks, but if we have more than one car for one concern, we will put all cars for that concern together while on our tracks, before going to the industry and that is about the same practice as is followed all over the Delaware, Lackawanna and Western Railroad where we perform spotting. In in-

370 stances where we have cars held short of delivery because of the disability of the consignee not having room on its tracks, such cars are subject to demurrage wherever they are held. We, of course, give shippers notice that we are ready to deliver in order to support assessment of the demurrage charge. Referring to industries described under (2)–C, that is, where we perform spotting, when they cannot accept cars and they are placed aside until the next time the switch engine is in the vicinity, such placement is on any track which may be convenient. I would not call such movement a secondary movement. A situation like the one just described very seldom occurs.

It would be physically possible for our engines to do the spotting service in the plants of industries listed under (2)–B, but it would interfere with plant operation and interfere with our operation too (T. 713–717).

As a rule industries listed under (3) are located upon spur tracks not exceeding a few hundred feet in length. In my direct testimony I mentioned several industries where the spurs were over 1,000 feet in length, i. e., Paterson Bridge Company and Richardson & Boynton Company. The service performed in spotting cars upon spurs of industries listed under (3) is not similar to the service

performed in placing cars upon interchange tracks for industries described under (2)–B as doing their own spotting. The time consumed by a switch crew in placing cars on the interchange for industries listed under (2)–B is less than that consumed in
371 placing cars upon the spur tracks for industries listed under (3). In serving a spur track if there is a car on it it is necessary to take it out; and if a car on a spur is partly loaded, it is necessary to wait for the shipper to close the car door before it can be moved, whereas where there is merely interchange placement, at an ordinary plant, carrier places cars on the interchange and takes from it cars the shipper has all ready to move.

On the point of time consumed, the service rendered industries listed under (2)–C, where our engines enter the plants of these industries having systems of plant tracks and do the spotting service, is identically the same as that rendered at industries where there are ordinary spurs. A great deal would depend upon the amount of business. It costs less per car to switch a plant than it does to place one car every 2 or 3 days on a spur track. In a general way we know the amount of time our switch engine ordinarily consumes in serving industrial plants, but as to the costs of the service we have not attempted to figure. It is possible that I could obtain information as to about how much time an engine usually consumes in performing plant switching. However, there have not been compiled any time studies which show the difference in the amount of time consumed in switching as between these various plants. It is difficult to furnish any figures as to engine hour switching costs as everyone has a different method of calculation. The only uniform thing is wages. Outside of that the costs vary (720–719).

372 "Reclaim", I believe, is a rule of the American Railway Association for the determination of how switching reclaims should be allowed. There is taken the total number of cars handled by the short line railroad for a year and then figured the total days time consumed in handling those cars to all of the connections. The average time consumed is the basis for the reclaim. In arriving at the time a car is on the South Buffalo Railway, the time consumed in spotting same is included. An impartial check is made on behalf of all carriers, and which is subject to change at any time, if notice is given; no one carrier can make the check; it must be for cars handled by all carriers and is made impartially by a representative of the American Railway Association.

The American Bridge Company, Elmira, New York, has 12 tracks. I did not mean to infer that all 12 are used for receiving and delivering cars for loading and unloading. Cars going into
373 that plant containing structural steel are spotted at cranes which unload the steel and place it in piles. That spotting is done by the industry; it is not an unusual spotting.

The Paterson Bridge Company, Paterson, New Jersey, has two long sidings, total 2,080 feet in length. The Delaware, Lackawanna and Western Railroad can spot 20 cars on each track. The longer the siding the lesser the mount of work performed in spotting.

If there were short sidings at this plant the service rendered in spotting would be greater than it is with its present sidings.

I presume there is some competition between the Paterson Bridge Company, Paterson, New Jersey, and the American Bridge Company, Elmira, New York (T. 720–722). They both ultimately receive the same service under the rate.

If the Delaware, Lackawanna and Western Railroad were to abolish the 700 or 800 private sidings in the Buffalo switching district, it would be physically impossible to deliver on our 18 Buffalo team tracks the freight now handled on said private sidings.

These private sidings are used as terminals for the carriers and this furnishing of sidings by industries results in an economy for carriers.

It would not be possible for the Delaware, Lackawanna and Western Railroad to deliver material for the Bethlehem Steel Corporation on public team tracks. To make delivery to that industry which is located on the South Buffalo Railway we would have to have a terminal like the South Buffalo Railway.

374 I am not a traffic officer.

At this point it was moved to strike all testimony of the witness with respect to the service included under the rates. The motion was denied and an exception noted to the ruling.

The general practice is for the industries to supply side tracks at their own expense.

At Buffalo we do not have more than one classification yard and we do not have a terminal yard or central classification yard there.

Demurrage charges are handled by our car accountant who is under my jurisdiction. The demurrage code covers only demurrage, and I do not see how the language of that code could be used to indicate a service a railroad is required to render a shipper in connection with rates.

Being asked whether, in a general way our terminal service may be divided into four classifications: 1. Interchange terminal service which covers switching to and from connections; 2. Commercial switching which covers delivery to and from shippers at private assigned sidings and team tracks; 3. Assembly service in the coal fields; 4. Terminal service at a port like Hoboken. That would cover the thing in a general way.

I do not think the interchange terminal service is less burdensome than our switching to and from private or assigned sidings (T. 1074–1083).

375 It is my opinion the handling of traffic to and from an interchange is not less expensive than the handling of other traffic.

In my judgment, in most of these instances where we furnish service upon private tracks, it, in substance, is a substitute for team track service, and the same situation applies where we handle cars to the interchange tracks of industries classified under (2)–A and (2)–B.

While we have not made a special investigation to determine whether the curvature, in the plants to which we make an allowance, is such as to preclude the use of our engines, we do know there are tracks in the plants over which we cannot operate.

I believe the Worthington Pump and Machinery Company, Harrison, New Jersey, owns the land upon which are located its side tracks and spurs, and such tracks are beneficial to both the industry and the Delaware, Lackawanna and Western Railroad.

376 Under our general side track agreement a shipper assumes liability for fire and accident resulting from our operations on the side track. Shippers do not object to that condition before we put in the siding. They accept it in order to obtain a siding.

The Worthing Pump and Machinery Company performs spotting with its own power. We have no side track agreement with it.

We have a number of industrial tracks on which are located more than one industry, one behind the other. Such tracks cause much switching, especially when it becomes necessary to spot a car or pull out an empty, but that situation is no different from what happens on our ordinary team tracks.

There are private side tracks off our regular right of way which serve more than one industry which are strung out one after the other. In switching of such tracks it is necessary to move cars already on these tracks in order to set a newly arrived car in. However, that is also what happens in connection with team track service (T. 733–738).

E. B. MOFFATT, being previously duly sworn, resumed the stand (Vol. 1, p. 765).

CROSS-EXAMINATION

I do not know whether the Republic Steel Corporation would permit us to spot its plant at our convenience. I did not ask them that question. If the industries to which we make spotting allowances had no engines and we had to spot their plants, I think

377 we would insist upon doing it at our convenience—we would endeavor to agree upon a time for spotting that would be mutually satisfactory. We have no understanding with industries to the effect that it is more convenient for industries to perform spotting for an allowance than to have us enter their plants and disrupt operations. These allowances were made a number of years ago. In fact, I think some of them were made during Federal control by a committee authorized by some of the federal managers working under the Director General.

It would not be possible for us to spot cars at all points in the various industries. I would not insist on going into the industries and performing spotting if it could be demonstrated that the industry could perform same cheaper than we could using our own power. I think it would cost us more if we were to perform spotting than we pay out as allowances. The reason it would cost us more is

because of the physical lay-out of the plants; the number of cars to be handled; furthermore, in most cases industries perform spotting with a crew to whom they pay less than the standard rates; they use small engines which may be maintained for a less amount than railroad power. I do not believe plant engines are subject to boiler inspection.

In most cases interchange tracks are within plants.

In most cases industrial tracks are on the property of the industries; in order to facilitate the pulling of cars, they may extend to the point of the switch where our track ends. I do not believe the states in which we operate have any "full crew laws" (T. 763–767).

378 The allowances to be paid these industries for spotting services were arrived at after an investigation of committees of spotting and operating officers appointed by all the railroads serving the particular plant (T. 783).

This committee is appointed to arrive at the cost of performing the service and before an allowance is made it is submitted to the Trunk Line Association.

The committee determines which is the most economical thing to do, either the railroad is to do the service or the industry, at the lesser cost; these allowances are based on these costs; and the allowances are in tariffs filed with the Commission (T. 784).

I mentioned that private industrial sidings contiguous to our right of way are in most cases owned and maintained by the industry, and in such cases the industry pays the taxes. If these sidings were abandoned and public terminal deliveries were made, any time we put in a track it increases the tax. We would have to pay taxes for our own terminals and public team tracks. I cannot conceive of any more economical way, with respect to large and small private sidings, than having the industries furnish these properties (796).

Erie Railroad Company

J. E. Ingling, General Supervisor, fuel locomotive operation of the Erie Railroad was called as a witness, being first duly sworn, and testified in part as follows (Vol. 1, p. 798):

We have no industries on the Erie Railroad system east of Port Jervis which perform the spotting service within their plants for which an allowance is paid (804). We have industries which perform their own spotting but to which no allowance is paid. A typical case of that kind is the American Brake Shoe and Foundry Company, located at Mahwah, New Jersey. There are about 17 tracks in this plant from 309 to 325 feet long. All our present locomotives in my opinion would not be able to operate on all of

379 those tracks without considerable change in certain of the tracks and clearance of their buildings. As to whether or not the power in use when this arrangement was made would perform the service, our power would never have gone in there (805).

Cars consigned to the American Brake Shoe and Foundry Company at Mahwah are switched out at Suffern by through local crews and assembled by a local switching crew doing the work in that zone and moved a distance of 1.5 miles from Suffern to Mahwah where they are placed on designated interchange tracks at the plant (805). We are then done with them. This is typical of all cases where the industry performs service and receives no allowance in that territory (806).

A typical industry where the Erie performs the service of spotting the cars is the Flintkote Manufacturing Company at Rutherford, New Jersey. They have 7 or 8 tracks and the length of these tracks will run from 150 to 800 or 900 feet (806).

The cars to the Flintkote Company are moved from points west and points east by through local drop crews with other cars consigned to this same territory, being switched out at Rutherford. The agent notifies the Flintkote Company of the arrival there by telephone or letter. The Traffic Department of the Flintkote will, in turn, notify the agent in the same manner of cars required for the plant and where they are to be placed. The agent makes out what is known as a switching list, passing it on to the conductor of the local switching crew in that territory, who performs the service enumerated on the slip. When the work is completed the slip is returned to the agent. Any cars that are at Rutherford for the Flintkote Company that are not called for on this slip are placed on the constructive placement under the demurrage rules (806–7).

An instance of an industry which is located on a spur track is the Hohokus Bleachery at Hohokus, New Jersey. Their siding will take about six or seven cars (807).

380 The cars for this plant are left out at Waldwick, New Jersey, with other cars consigned to that zone. The local drill crew at that point assembles the cars required for the Hohokus Bleachery on instructions from the agent, and they are moved to the Bleachery. In any switch movement at that point, it is necessary to switch out any cars, either empty or loaded, that are required for movement east or west. Any cars consigned to the plant are placed in their respective places (807).

381 H. R. ADAMS, Assistant General Manager of the Erie Railroad, was called as a witness, being first duly sworn, testified as follows (Vol. 1. p. 823):

DIRECT EXAMINATION

I am Assistant General Manager, Erie Railroad. My testimony will cover the operations on the line west of Port Jervis, to and including Buffalo and Salamanca and possibly a little territory west of that.

The handling of carload freight is divided into two classifications the same as in the New York district, i. e., delivery on team tracks and on private sidings. There are industries at which the

Erie places the cars on the interchange track and the industry does the spotting and switching. There are also industries at which the Erie does the spotting within the plant. There are also industries with one spur, or perhaps two or three, at which delivery is made by this carrier. The services performed by the Erie at these industries in this district are the same as that performed at the same classes of industries in the New York district. Unlike this latter district there are in the western district industries performing plant services beyond the interchange track to which an allowance is paid by the Erie (T. 823–824).

The American Bridge Company at Elmira, N. Y., is a typical example. Cars destined to this plant are set off with other cars for Elmira by through trains. They are grouped, and each morning taken to the interchange track at this plant. This interchange is adjacent to the tracks of the Erie. The plant takes them
382 from the interchange track with its own engine and spots them within the plant as they require them. This interchange is off the main track, and is of such a length that the cars can be placed there without interfering with main line operations. An allowance is paid by the Erie to this company for this service.

At the American Locomotive Company at Dunkirk, N. Y., the Erie assembles the cars at Dunkirk, and delivers them to a track designated as an interchange track. From this point the company's locomotive takes them and spots them within the plant. No allowance is granted to this company.

The Erie simply exchanges cars with the Bradford & Western Pennsylvania Railroad at Lewis Run, Pa. We deliver cars on a track adjacent to the Erie's main track. From this point the B. & W. P. locomotive takes the cars into its plant and spots them. No allowance is granted to this company. My understanding is that this railroad is an industrial common carrier. These industries are practically the same as all of the others listed by the Commission. We deliver cars and the plant locomotive takes them and then returns the cars to us.

The Erie reaches the Johnston Harvester Company at Batavia, N. Y. There is no difference in the operation at this plant. We deliver the cars on a track from which they were removed by the Company's locomotive and placed into two different plants that are separated. No allowance is granted to this company (T. 824–827).

The Erie delivers cars to the South Buffalo Railroad on a designated interchange track and receive cars in exchange for them at the same point.

383 The Buffalo Creek Railroad serves many industries in Buffalo. The Erie interchanges carload traffic with this carrier the same as any other railroad.

The Erie grants an allowance to the Hanna Furnace Company at Buffalo. This plant is located on the tracks of the Erie. This carrier does grant allowances to industries which are not served directly by the Erie, but are reached through another line. The Wickwire

Steel Company at Black Rock, N. Y., is one. The Erie reaches this plant through the New York Central. The Erie absorbs the New York Central's switching charges, and grants an allowance to the plant. We have a direct connection with the Tonawanda Iron & Steel Company, i. e., we deliver the cars to the plant receiving track. We make an allowance to this plant. The Republic Steel Company is reached through the South Buffalo Railroad. The switching charges of the latter are absorbed and an allowance is also granted.

The Susquehanna & Tioga Division runs from Susquehanna, Pa., to Hornell, N. Y. The American Bridge Company is the only plant on that division that receives an allowance. But there are others who receive allowances in the territory over which I have jurisdiction—Port Jervis to Buffalo and Salamanca.

On exhibit no. 81 sheet 1 it says there are no industries on the Susquehanna & Tioga division into which the Erie goes to perform spotting service. This is in error. This carrier goes into the
384 plant and spots the cars of the Willis-Morrow Company at Elmira, N. Y. No allowance is granted this company. It manufactures automobile parts. The American LaFrance Company at Elmira is also another plant on this division at which the cars are spotted by the Erie. This plant manufactures fire trucks and fire extinguishers. No allowance is granted it. The Endicott-Johnson Shoe Company at Johnson City is another.

Exhibit no. 80 covers the Delaware Division. The division runs from Port Jervis west to Susquehanna. Exhibit no. 82 embodies the same information for the Wyoming Division; Exhibit no. 83 for the Allegheny & Bradford Division.

The Grassy Island Railroad is a piece of main track connecting two other points in the coal territory at Jessup, Pa., in the vicinity of Scranton. It is merely used as a connecting link between two sections of the Erie track (T. 829–837).

An allowance is granted the American Bridge Company because it is cheaper than having the Erie perform the service. A study was made several years ago, and because of the rate of pay, and the number of men employed in making up the crew, it was determined that the plant could do it cheaper than the Erie. This carrier performs these services at other plants not always because it is cheaper than paying an allowance. In many cases the industries are not equipped to perform the services. I presume that no allowances have been requested in instances where the industry performs the service. In instances embodied in Exhibits nos. 81–83, inclusive, where the industries perform the services and get no allowance, a study was made and it was determined that they could do it more economically than the Erie although the latter is able
385 and willing to do it. The service performed at private sidings or spurs is similar to that performed on public team tracks. There are cases where, from the standpoint of time and cost, it is more burdensome to perform services at a private track than it is at a public team track, but these instances are in the minority. I would

take as an example a private siding or spur that had two or three designated spots on it at an outlying point, as compared with the team track, that the cars are pushed in onto the track as you brought them up and not be required to switch them in any particular line-up before you could push in on the track to spot for unloading. That would also apply to a plant with perhaps three, four, or five tracks. Where the cars are pushed in onto a track, as I said before, regardless of how they stand in the string, it consumes less time, more economical to make a straight push onto a track than it is to line cars up for designated spots, which of course necessitates time to make switches.

I do not recall any particular spot that would be exceptionally burdensome over the terminal service performed. When we set a team track or an individual track, the most simple, economical service we perform is the delivery of a car on an interchange track, which constitutes delivery. For instance, in the case of the American Bridge Company at Elmira, we take the car up and place it on the interchange track, and we are finished with the car until it is returned on the interchange track, by the consignee with their power, empty, and we take it away. When we have placed the car on the interchange track it is my view that we have
386 completed the physical movement of the cars. The movement by the American Bridge Company from the interchange track to the point of unloading is a movement for the Erie Railroad, for which the plant is compensated by the Erie (844). My intention was to answer the gentleman's question, to give him the most simple terminal service that we perform on a car. When we place the car on the interchange track, so far as our power is concerned, we have moved it as far as we will be required to from that point. I presume if the agreement or understanding with the American Bridge Company was abrogated and it was necessary for us to place the car at a point where they could unload it, that we would be required to do so (845). I cannot say as to an agreement with the American Bridge Company; there is an understanding; it is a custom that has been followed for a great number of years—there is a practice—that the interchange track is the point at which the American Bridge Company takes the car with their locomotive and place it into their plant (845).

The Lackawanna Railroad does not place cars on the same interchange track. I assume that the Lackawanna has an interchange track (846).

Being asked whether or not the American Bridge Company does the spotting with its own power because, if it permitted the Erie or Lackawanna to enter its plant and switch cars at carrier's convenience it might interfere with plan operation, I do not know that (846). Being asked do I know whether or not the American Bridge Company takes delivery on the interchange track so that the cars can be spotted for its convenience, I do not know it but I think, of course, that it is a convenient service to them—a locomotive right there at all times.

387 I cannot answer as to the basis for the allowance, why it was given. I do not know whether we ever spotted cars within the plant with our own power. I have been informed there was a study made a great many years ago before I came to this territory and it was decided by those who conducted the study that that was the most economical way to do it (846).

388 There are instances when cars are spotted at particular points on public team tracks. It is seldom, however, that a consignee requests delivery at a particular spot, we try to oblige the shipper. Sometimes this would require a switch.

At plants in which the Erie performs the switching the cars taken to that plant by the switch engine are those which the industry requires. This list of required cars is telephoned to the agent.

This carrier's team tracks are not capable of handling all the traffic delivered to both private sidings and plant industrial tracks. The number of public team tracks would have to be considerably increased to handle all the carload traffic of the Erie. In important centers it would be enormously expensive to enlarge the team tracks. In large commercial and industrial centers there are more than one system of team tracks. These vary in distance from the make-up and break-up yard. In busy times it frequently occurs that team tracks can not handle all the cars consigned to them. In such cases an attempt is made to advance the car from the break-up yard to some storage yard near the team track. This is done for the

389 sake of economy and to relieve congestion. Surplus cars are left in the general yard only when it is impossible to advance them. The handling of surplus team track delivery cars is about the same as handling surplus cars destined for private or industrial tracks.

The American Bridge Company takes its cars from an interchange track and spots them. Outgoing cars are moved out and placed on the interchange track from which place the Erie takes them. I am not sure whether or not this track is on plant or railroad property. It is adjacent to the Erie's main tracks (T. 846–851). This plant can not load or unload a car while it is on the interchange track.

L. c. l. freight is handled over the carrier's own property. It is taken from the consignor and given to the consignee. In team track delivery this carrier provides an entrance to the highway and, in large centers, a loading space in the form of a wide roadway. The maximum width of this space is about 45 feet. In delivering freight it is fundamental that arrangements and circumstances are such that the shipper can take possession of it. When a car is placed on an interchange track it is not accessible for loading or unloading. But the carrier performs no further service on that car.

In cases like the American Bridge Company empty cars are placed on the interchange track as well as loaded cars. The empty is placed there so as to haul a carload of freight for the shipper. The

movement is as much of a benefit for the carrier as it is the shipper. But the load could not be secured until the car was taken into the plant and placed in a position to be loaded. This movement into the plant's loading point must either be done by the carrier or the plant. A car destined to a consignee who usually takes team track delivery is placed on the team track as soon as possible
390 after arrival and notice is given to the consignee. Demurrage time starts on such a car at 7 a. m. after the notice of arrival. If the consignee is not able to handle it the car would be held and not placed on the team track if the latter was busy. If there was plenty of room on the team track the car would be placed there regardless of the consignee's inability to handle it (T. 851–855).

The cheapest terminal service as regards time is the simple placing of cars on interchange track. The most expensive, as regards time, is the placing of cars on a siding at a particular door which involves the shifting of cars already on that particular track. This usually occurs on small sidings or spurs rather than on the industrial tracks of large plants.

The make-up and break-up yard of the Erie for South Buffalo is at East Buffalo. The interchange tracks from the Erie to the South Buffalo Railroad are about a mile from the Erie's break-up yard at East Buffalo. The cars are moved from this break-up yard periodically and placed in a single string on the interchange track. The team track of the Erie farthest away from this break-up yard is about 1.5 miles. All of the team tracks of the Erie in Buffalo are within 1.5 miles of its train yard. The Wickwire-Spencer Company is located on the New York Central but an allowance is granted by the Erie. I do not know whether or not the N. Y. C. also pays this company an allowance. The Hanna Furnace Company is served by the Erie and is granted an allowance. The Wickwire-Spencer Company spots the cars at its own plant. The same is true of the Republic Steel Company plant on the South Buffalo Railroad.

The South Buffalo Railroad serves a large number of industries. The team track at Black Rock is about 10 miles from the
391 break-up yard at East Buffalo. Cars are taken from this break-up yard and placed on the team tracks at Black Rock. The latter point is within the Buffalo switching district. The cars are not handled directly to the team track. One switching crew takes them from the break-up yard to Black Rock. At that point another switching crew and engine disposes of them. The primary break-up yard is at Buffalo. There is a secondary classification yard at Black Rock. The haul between this point and Buffalo is a switching service (T. 855–861).

JASPER N. HAINES, General Manager, Lehigh Valley Railroad, was called as a witness, being first duly sworn, testified as follows (Vol. 1, p. 934):

DIRECT EXAMINATION

I am General Manager, Lehigh Valley Railroad Company. I have been connected with the operating department of the Lehigh Valley Railroad for 33 years.

A map of the Lehigh Valley Railroad and connections was received in evidence, and marked "Carrier's Exhibit 86, Witness Haines."

There are a number of short line common carriers connecting with the Lehigh Valley, some of which are listed in the list sent out by the Interstate Commerce Commission, but there are others in addition thereto; I will proceed in a general way to state the operating relationship between the Lehigh Valley and the several short line common carriers, beginning at Buffalo and proceeding eastward.

South Buffalo Railroad, Buffalo, New York

The interchange with this road is made on our Lehigh and Lake Erie branch at a point about 1½ miles from our Tifft Terminal. Traffic for industries located on that railroad is switched out and delivered on its interchange tracks and traffic from industries on said road is brought by it to the junction of the Lehigh Valley and placed on the interchange track, from which point it is moved
393 by the Lehigh Valley to Tifft terminal yard and assembled into trains for outbound movement. The South Buffalo Railroad is a subscriber to the per diem rules agreement. It pays per diem direct to car owners and is allowed a reclaim of $3.50 per car under per diem rules of the A. R. A. Demurrage is handled by the South Buffalo Railroad. The same relations as with any class I carrier doing switching for the Lehigh Valley.

Niagara Junction Railway Company, Niagara Falls, N. Y.

We do not have physical connection with this railroad but the interchange is handled by the New York Central. We deliver and receive business for industries on this road to and from the New York Central. It is a subscriber to the per diem rules agreement and is allowed a switching reclaim under rule 5 of $3.21 per car. Demurrage is handled by the Niagara Junction Railway.

Genessee & Wyoming Valley Railroad, Pittsburgh and Lehigh Junction, New York

The connection with this road is at Pittsburgh and Lehigh Junction alongside of our yard. We place cars for that road on an interchange track at the junction and they are removed by Genessee

& Wyoming Valley crews. Cars coming to us are placed in a similar interchange track and removal by our crews. The per diem is handled in accordance with the decision in Docket No. 17801, under which we pay per diem to car owners while the cars are on
394 the Genessee & Wyoming Valley and charge to them per diem accruals in excess of two days per car. Demurrage is handled by the Genessee & Wyoming Valley Railroad.

New York State Railways, Rochester, New York

The Rochester Subway Railroad is a system of tracks owned by the City of Rochester on which, under a trackage agreement with the city, service is performed for various railroads, including the Lehigh Valley, by the New York State Railways as agent for the Lehigh Valley. Cars for industries located on the Subway Railroad are placed on the interchange track by our yard engine and then moved to a place at various plants and industries on the Subway Railroad by the New York State Railways' power as our agent. Cars from these industries are delivered on the interchange track by the New York State Railways as our agent and removed therefrom by our yard engine. The Lehigh Valley pays the per diem while cars are on the Subway Railroad and assesses and collects the demurrage. The only charge published by said railroad and absorbed or paid by the Lehigh Valley is simply the charge we pay the Subway Railroad for acting as our agent. Rule 3–D (private track delivery). It is my understanding that the operation referred to has the approval of the Interstate Commerce Commission. The Rochester Subway Railroad is merely a system of tracks, owned by the City of Rochester, and it has neither cars nor locomotives. It contracts with the New York State Railways to furnish power and do work on its line for the connecting road at Rochester. It
395 has no corporate name; the name used is merely to represent the tracks.

West Pittston & Exeter Railroad, Forest Castle, Pa.

This road connects with our West Pittston branch at Coxton, and cars for industries on that road are delivered on interchange tracks, while cars received from it are placed on similar tracks at the junction. Per diem settlement is in accordance with I. C. C. 17801, under which we handle the per diem accounts and charge the West Pittston & Exeter Railroad for any per diem in excess of two days on business handled on through rates of which the West Pittston & Exeter gets a division. On business handled on a switching rate we allow reclaim in accordance with the average detention of cars not to exceed five days. The West Pittston & Exeter handles the demurrage.

Philadelphia, Bethlehem & New England Railroad, Bethlehem, Pennsylvania

The interchange of cars with this road is made on tracks located between its line and ours at Florence, Pa. The carrier is a subscriber to the per diem rules agreement and pays per diem direct to car owners and is allowed a reclaim under rule 5 of $1.88 per car. The Philadelphia, Bethlehem & New England handles the demurrage accounts.

East Jersey Railroad & Terminal Company, Bayonne, N. J.

Cars for industries on this road are delivered on interchange
396 tracks located between it and our line, while cars from said road are received on similar tracks. Per diem is handled in accordance with I. C. C. Docket 17801, under which we pay the per diem to car owners and charge the East Jersey Railroad & Terminal Company for per diem in excess of two days. Demurrage is handled by the East Jersey Railroad & Terminal Company.

Atlantic Port Railway Corporation, Newark, N. J.

We do not have a physical connection with this railway, but cars for it are interchanged with the Pennsylvania Railroad at Oak Island and delivered by the Pennsylvania Railroad to the Atlantic Port Railway. We have had no business with this road for a considerable time. However, since the decision in I. C. C. 17801, per diem settlement would be in accordance therewith (T. 934–940).

There are located on the Lehigh Valley Railroad industries which have their own tracks and perform their own service beyond a designated interchange track and receive an allowance for performing that service. I will name those industries and give a brief description of the service in connection therewith:

Hanna Furnace Corporation, Buffalo, New York

This plant is located on the tracks of the Pennsylvania Railroad and the South Buffalo Railroad. Business to and from the plant for our line is handled over the tracks of the Pennsylvania Railroad under trackage arrangements whereby we pay 55 cents per loaded or empty car, we handling the business with our yard engine
397 and placing it at and receiving it from agreed interchange tracks at the plant of the M. A. Hanna Company. We pay per diem on cars and handle demurrage under rule 3–E (940). The interchange track is merely a designated track in the plant where they have agreed to let us place the cars, and they will take them from there and spot them in their plant, for which service we make them an allowance. They have agreed to accept on the interchange track for further placement. Our service is not completed until the car is placed at the point in the plant where they desire to have it placed,

and then we don't do that ourselves, but we put the cars on a designated track and then they do this placing for us (941).

The Lehigh Valley recognizes a duty on its part under the line haul rate to carry the car to the usual and customary point of loading or unloading at one given spot within the industry, and here is a case where for convenience and upon agreement of both parties an interchange track short of that ultimate destination of the car has been designated and beyond which the carrier would pay the industry completing the line haul duty. The convenience is probably mutual in the majority of cases. In my opinion it is mutual in all cases. The industry no doubt had reasons of their own for providing their own power and doing their own spotting. Otherwise they would not need to do it, because it is an obligation of the railroad to do the spotting that they are doing, and if they did not provide the service we would have to. There are various reasons why they would prefer to do it themselves. About the only reason that we would decide to permit them to do it, instead of doing it ourselves, is because they can do it for less cost than we could do it ourselves (942).

We could hardly do any spotting at our convenience. We have got to consider the requirements of the receiver in all of our spotting on team, private track, or system tracks. We do spot cars on the team track or on ordinary spur track without consulting the consignee, but if we have a shipment for team track or private
398 track that a shipper wants, it is not just as handy for us to place it in the morning as it is in the afternoon, and he wants it in the morning, we place it in the morning. We can't consult our convenience in any instance, naturally (942).

In the ordinary course of operation of yard engines in working at industries, private tracks and team tracks, we have a fairly regular schedule for doing the work, and that schedule is not based on our convenience entirely. It is based on the requirements of the service. If, in carrying out that schedule, a certain consignee said it would be more convenient for him to have you come back three or four hours later, whether we would do it would depend on whether we had an engine in that territory and could fully meet his requirements in the particular service on team tracks, private tracks, and other industries; we have got to take into account cost somewhat, our own convenience, and also the convenience of shippers. We aim to perform service at these plants at a time that is satisfactory to the industry. We set up our schedule with that in view. Being asked, when this schedule is set up to spot these industries, which is at a time that is generally usually satisfactory to both, but for some reason or other the industry finds it inconvenient at that particular time to take the shipment would we ordinarily send a locomotive out there any time they wanted the car spotted, no, we would not. At the same time, we would undertake to meet it as an unusual situation on a siding or at a plant if we could (943).

In answering the Director I do not wish to be understood when I say it is the carrier's obligation to perform the spotting which this

industry performs itself, that it is the carrier's duty to perform all of the spotting that the industry may do with its own crew—the intra-plant movements, for example. I meant only the first spotting, which we believe is covered by the line haul rate (943).

399 The Republic Steel Company, Buffalo, New York

We have no physical connection with this plant, but cars to and from our line are handled to the plant and placed on or received from an interchange track by the South Buffalo Railway, The Delaware, Lackawanna & Western Railroad, and the Buffalo, Rochester & Pittsburgh Railway. The Lehigh Valley absorbs switching charges of these lines. Switching reclaim is allowed these roads under per diem Rule 5. An allowance is made this industry based upon the theory that it is performing a service for us by placing cars which we are obligated to place. We could place cars at points of loading and unloading within the plant if we had trackage rights over the rails of the carriers having direct connection with the plant. It is my understanding the rate includes the delivery of the car at the point where consignee desires to unload, and even includes delivery beyond our rails (T. 944–945).

Tonawanda Iron Corporation, North Tonawanda, N. Y.

We do not have a physical connection with this plant, but cars to and from our line and this plant are handled to the plant and placed on or received from an interchange track by The New York Central, we setting off and picking up cars with road crews in the yard of The New York Central at North Tonawanda.
400 Switching reclaim is allowed The New York Central under per diem Rule 5, and it handles the demurrage account. The Lehigh Valley absorbs The New York Central switching (T. 946–947).

Wickwire Spencer Steel Company, North Tonawanda, N. Y.

We do not have physical connection with this plant. Traffic is handled to the plant and placed on and taken from an interchange track by The New York Central. We set off and pick up cars for this plant with road crews in the yard of The New York Central at North Tonawanda. Switching reclaim is allowed The New York Central under per diem Rule 5, and we handle the demurrage account under Rule 3–E. The Lehigh Valley absorbs The New York Central switching.

American Bridge Company, Elmira, New York

We do not have physical connection with this plant, but cars to and from it are delivered to the Erie Railroad at Elmira for handling to the interchange. Switching reclaim is allowed the Erie under

per diem Rule 5, and it handles the demurrage account under Rule 3. The Lehigh Valley absorbs the Erie Switching.

Wickwire Brothers, Cortland, New York

Traffic to and from this plant is placed by the Lehigh on interchange tracks between our yard and the plant, and is handled to and from said track by engines of the industry. We pay per diem on the cars and handle the demurrage account under Rule 3–E. Our tracks reach this particular plant.

501 William Wharton, Jr., Inc., Easton, Pennsylvania

This plant is located on the eastern and northern branch of the Lehigh Valley at Easton and cars to and from the plant are placed on interchange tracks in the plant. We pay the per diem and handle the demurrage account under Rule 3–E.

Warren Foundry and Pipe Company, Phillipsburg, N. J.

This plant is located alongside our Phillipsburg yard, and cars to and from it are interchanged on tracks within the plant. We pay the per diem and handle the demurrage accounts under Rule 3–E (T. 947–948).

Standard Oil Company of New Jersey, Bayonne, N. J.

Cars to and from this plant are placed on interchange tracks between the plant and our tracks. We pay the per diem and handle the demurrage account under Rule 3–E.

I know of no written agreement in any case where an industry will accept delivery on an interchange track. There is an understanding with the Lehigh Valley, and it is a practice that has been in effect for many years, that the plant will deliver on interchange tracks.

The following industries have their own tracks and perform their own spotting without receiving an allowance:

The Empire Gas and Electric Company, Geneva, N. Y.
Vulcan Iron Works, Wilkes-Barre, Pennsylvania.
Lehigh Structural Steel Company, Allentown, Pa.
H. Sofranscy & Company, Allentown, Pa.
Lehigh Valley Transit Company, Allentown, Pa.
Duquesne Slag Company, Easton, Pa.
402 Barber Asphalt Paving Company, Perth Amboy, N. J.
C. A. Bloomfield Clay Company, Perth Amboy, N. J.
Ostrander Fire Brick Company, Perth Amboy, N. J.
U. S. Raritan Arsenal, Perth Amboy, N. J.
Raritan Hollow Tile Company, Perth Amboy, N. J.

The Empire Gas and Electric Company, Geneva, N. Y., is typical of this class. The plant of this industry is located alongside our

Geneva yard and traffic to and from it is placed on interchange tracks inside the plant. We pay the per diem and handle the demurrage accounts under Rule 3–E. All other plants mentioned are handled in exactly the same way except the U. S. Raritan Arsenal. At that point we place cars of explosives on a designated interchange track and the engines of the U. S. Arsenal spot them. All other cars in the plant are spotted by our own engines.

The Lehigh Valley performs spotting at all single track sidings wherever they occur on its line, and it also performs the switching on the so-called systems of industrial tracks at other industries. In the case of these two classes, that is, (1) systems where the Lehigh Valley does the switching, and (2) single lines, the railroad performs the service with its own power. Cars for various industries and single track private sidings are classified in the main yards, are picked up by the Lehigh Valley switching or road engines and moved to the various plants where they are spotted on the different tracks or at the different warehouses as required by the shipper. Said engines remove cars when empty, and, of course, place empties for loading and remove loaded cars. The railroad pays the per diem and handles demurrage accounts under Rule 2–A (T. 948–950).

403 The Coplay Cement Manufacturing Company

This industry has two cement mills located at Coplay, Pennsylvania, Mill B being served by the Lehigh Valley Railroad and the Ironton Railroad, and Mill C by the Ironton Railroad. It has no locomotive, and all service is performed by the Ironton and Lehigh Valley railroads. The situation at these plants is the same as at other cement plants in the territory.

Ironton Railroad

The Ironton Railroad is a common carrier, a subscriber to the per diem rules agreement; it pays per diem direct to car owners without reclaim and handles demurrage accounts. Interchange with this road is the same as with other common carriers. The junction between the Ironton Railroad and the Lehigh Valley Railroad is Hokendauqua, Pa.

G. H. Markle Company

The name of this company has been changed to Jeddo Highland Coal Company. The industry is engaged in mining and shipping anthracite coal and has several operations on our Freeland and Ebervale branches. It owns several small standard gauge locomotives and has trackage rights over portions of the branches referred to, used primarily for intraplant service, but they do at times handle loaded and empty cars at breakers which ordinarily would be handled by our mine engines. This is done in order to facilitate
404 and expedite the work. The industry receives no allowance for such work.

New Jersey Zinc Company of Pennsylvania

This industry removed from our tracks several years ago. However, it does have a small operation on our lines at Freemansburg, Pennsylvania. It has no locomotives, and the plant is served by our engines.

The Raritan Terminal and Transportation Company

This industry is a subsidiary of the Anaconda Copper Company. It has no standard gauge locomotive and service at this plant is performed by us. It owns, and we lease from it, the track between our line and the Copper Company's plant. There are three plants located on this track which are served by us. However, one is not now in operation. The track which we lease forms a branch line over which we reach and serve all industries located on it and perform all service at said industries.

Susquehanna and New York Railroad

The Susquehanna and New York Railroad is a common carrier. It subscribes to the per diem rules agreement, pays per diem direct to car owners without reclaim and handles demurrage accounts. Interchange with this road is the same as with other common carriers.

Owasco River Railroad

The Owasco River Railroad is a common carrier. It sub-
405 scribes to the per diem rules agreement and is allowed switching reclaim on cars handled from our line to industries located on it. The junction between the Owasco River Railroad and the Lehigh Valley Railroad is Auburn, New York. The Owasco River Railroad performs only a switching service (T. 952–954).

CROSS-EXAMINATION

406 We believe it is the obligation of the carrier to place the car wherever designated, as covered by the rate, in his plant for unloading. In some instances, the receiver prefers to do that himself, and asks for an allowance, and then an investigation is made with respect to the amount of the allowance, and if it is to be less than the cost to the carrier, that allowance is made, and the industry permitted to do the placing for us at a charge (955).

Director BARTEL. What reasons do they assign for their desire to do the switching?

A. I don't know that I know of instances where definite reasons were given. We think we know that generally it is of some advantage to the industry to do this switching; otherwise, they would not offer to do it. I think, as a general proposition, the industry doing the switching, either for an allowance or without an allowance, requires a locomotive, or more than one, of their own, in their plant

work, in order to facilitate the handling of their plant. While they have that engine in service, they can very well, with convenience to themselves, do the spotting of cars for us. From our standpoint, there is no question about our obligation to do this work. Unless a plant is willing to do it, we must do it (955–6). That is, make one spot. The one spot under the line-haul rate should be made substantially at the convenience of the industry, although a carrier must give some consideration to its convenience. For instance, if we had two plants side by side, we would persuade each of them to
407 have work done about an hour apart instead of one in the morning and the other in the afternoon. I think, as a general proposition, plants are able to operate more economically by performing their own service than by depending upon us, because their engines are present all the time while ours are not, and generally that is their principal reason for wanting to do their own spotting.

I doubt if any industry is willing to perform spotting without compensation. It is true that some plants perform their service without definite payment therefor. However, I think they do receive compensation by expediting their work. I don't know of any case where a request for an allowance has been denied (T. 954–957).

It is my belief rates include delivery on plant tracks at a place where traffic can be loaded and unloaded, and I, therefore, assume it to be the duty of a carrier to make a placement at such locations. In some instances it is found to be more economical to the railroad to have a plant perform spotting for compensation, and in some other instances it is found to be more economical for the railroad to perform it.

There are not many things in connection with a railroad into which competition does not enter, and it enters into this question of spotting allowance, but I would not say it is the dominant factor. I can't see whether we are exactly right in talking about
408 competition. It is rather a question of our getting into these plants in this way or not at all, or in some other way. We might get into these plants that are not on our line by building a line into them, if that was physically possible. That would be difficult in a great many cases, and probably more expensive than to get into them the way we do by paying another railroad to do the work for us.

In some of the stations we have gone into considerable expense to get into the plant, not because the plant was without service or it was necessary for the Lehigh Valley to get in there, but because the Lehigh Valley Railroad wanted to get in there—to get our share of the business—in competition with other railroads that served that plant, and at the same rates. We would like to get into every plant that is in our neighborhood (T. 958).

As to an industry that may be located on a siding of the Erie Railroad, the traffic that is competitive as between the Lehigh Val-

ley and the Erie, we reach that plant through paying the switching charges of the Erie Railroad. We don't get into a plant from an operating standpoint, but from a traffic standpoint. That would be true in reference to a good many plants that may be served by railroads other than the Lehigh Valley direct, so that the competitive factor is a substantial one if not the outstanding one as to our getting into these plants, and the extent we go in absorbing charges in order to reach that traffic (T. 959).

409 Ordinary sidings are considered as more or less a substitute for team track delivery, you could term it that way. In some instances delivery on sidings is found to be more difficult than delivery on team tracks and in other instances less difficult.

By use of these private sidings the Lehigh Valley upon which to make our deliveries, we are saved the expense of enlargements to terminals, etc. Team tracks without private sidings would be entirely inadequate and unfortunately in a great many situations even with a large expenditure of money, we would not have room to extend team track facilities sufficiently to take care of the private siding business.

Substantially the same conditions exist in connection with the systems of plant tracks as with the ordinary single private sidings. There is very little difference—there is no difference in the way the work there is performed except in the number of tracks (T. 959–960).

In some instances it requires more time to spot in a plant than it does on our team tracks and then again it requires less time. The time consumed depends upon the distance an industry or team track is from our break-up yard, and then, with respect to team tracks the time also depends upon how much spotting is necessary. For example, take automobiles, over-head cranes, or something of that sort. Warehouses or plants may be located on a single private siding, in which case it becomes necessary to spot certain cars at certain

410 buildings, whereas with a system of team tracks, the tracks go to buildings in each of which a different kind of material may be unloaded. Therefore, it cannot be said that more time might be consumed in spotting a team track than a private track.

Looking at the matter as a whole, from an operating standpoint and generally speaking, it is as economical to place cars on a plant track as it is to place them on a private siding or team track, having in mind, of course, that at some plants difficulties are encountered; and also having in mind that in some instances it is possible to spot a string of cars by one shift, while in other instances it will be necessary to spot each car in a string at a different place.

I do not know of any economy that could arise from a change of this practice which has grown up and which is practical and quite necessary to continue.

It is our practice where we have a number of cars that the tracks at the industry are not always open and vacant or free to spot these

loads on, and in order for the industry to conduct its business in a reasonable manner free from obstacles on its tracks, it requires certain cars of certain traffic placed at a plant at certain definite times, the railroad yard master or engine foreman, who is in charge of the operation, is furnished with what is called a switch list, specifying the particular cars that are required by the industry for placement on a particular day. The yard master or engine foreman
411 takes the switch list, goes out to his hold yard, or classification yard, and drills out cars in the order that the consignee wishes and brings them to the plant and places them inside at their respective locations, desired by the consignee. Under such conditions cars held short of delivery are placed under demurrage penalties while they are held pending disposition instructions from the industry to the consignee. I know of no situations where cars are held out that are not subject to those rules.

As to whether it is more costly to perform spotting beyond the interchange tracks than to place the cars on the interchange tracks where the industry takes possession of them with its own power—I don't know of any place where we are not to an extent required to wait on the convenience of the consignee. You know, there is a limit—I assume the reference to team tracks—there is a limit to the capacity of our team tracks, the same as there is to our industry tracks. With the very light business, there isn't much difficulty, but in times gone by, we had to hold our cars from them as at those private sidings. We had to do exactly the same thing on our own tracks as we did with private tracks, hold cars out. As to whether we put them under constructive placement—it is our disability on a team track. We had to go through the same operating performance. Ordinarily we do not place cars on a team track where it is strictly a team track. Team track cars, however, like automobiles must be placed at a particular location on that team track. Cars requiring the use of a crane must also be placed at particular
412 locations, and in many cases, not so much at terminals as along the line of the road, warehouses are built alongside of a team track, and in such cases we must make a particular spotting of cars on that team track at the warehouse. Ordinarily there is not such exact spotting on team tracks as is required on private sidings. There is a greater amount of particular spotting in the system of private tracks than there is in the team track. The team track is not entirely free of particular spotting.

By reason of greater density of traffic and tonnage, the cost of spotting at large industries is less per car than at small ones—there is a greater tonnage from which to develop our engine hour cost (T. 960-964).

REDIRECT EXAMINATION

My statement with respect to competition has nothing to do with the matter of allowances to industries, but relates to allowances paid to railroads as consideration for permitting us to get to in-

dustries located on their rails. Our allowances to industries are made only because it is more economical to do so than to perform spotting ourselves.

The Lehigh Valley regards itself in every instance bound to make a delivery within the plant, provided the industry wants us to make the kind of delivery we are obliged to make under the line-haul rates, and even where industries perform service beyond interchange tracks without receiving an allowance, the Lehigh Valley is willing to make one free delivery under the line-haul rate. If the
413 one free delivery is not satisfactory to an industry, and for reasons of its own it prefers to do spotting without an allowance, it is my understanding that the willingness of the railroad to make the one free delivery relieves it of any obligation to make an allowance.

I know of no case where an application was made to the Lehigh Valley for an allowance where the industry itself has been unwilling to admit the Lehigh Valley into its plant, and wishes to perform the service itself. I know of no special explanation where most of the industries—other than iron and steel— at least the larger number of them, either perform the service themselves or have the Lehigh Valley perform the service, because of the kind of traffic that is handled. I think there is a greater amount of business involved where allowances are made than where the work is done and no allowances are made on our line. Some of the plants that have locomotives and do the spotting for us without track compensation is that the work actually done for the railroad is of such a very small amount, that we probably could not afford, if they ask for an allowance to grant it, and that we had better do the work ourselves, because we have an engine in the immediate territory and probably with a small amount of spotting to be done we could do it incidental to our ordinary work of the yard engine.

We make no discrimination in the rule, that is, the conditions that guide us in determining whether the allowance will be
414 made under situations where the plant performs the service, or whether we will insist upon the service which is to be given in the plant, or whether we will make delivery at the gate of the plant and allow the industry to perform the service without an allowance.

I know of no cases where we take cars from our classification yard and place them on a track convenient to an industry and then later at the request and convenience of the industry spot them. If we did have such cases, I would not consider the second move as a second spotting, because the cars have by the first move merely been stored. Demurrage rules cover the assessing of demurrage and not the delivery of freight under the line-haul rate. A car can be constructively placed on a track convenient to the industry or on a yard track and when so placed demurrage is assessed. Such placement is for demurrage purposes and is not a delivery (T. 964–973).

415 **Lehigh Valley Railroad**

IRA S. AUCH, General Freight Agent, Lehigh Valley Railroad, New York, N. Y., was called as a witness, being first duly sworn, testified as follows: (Vol. 1, p. 973).

DIRECT EXAMINATION

I am General Freight Agent, Lehigh Valley Railroad Company. I have been connected with the Lehigh Valley Traffic Department for 10 years, and am familiar with the substance of the tariffs relative to various terminal services under inquiry.

The carload rates applying on merchandise freight to points on the Lehigh Valley Railroad apply to the usual place of delivery as destination and include one spotting or delivery at its depot, team, industrial or interchange tracks. The reverse of this is true in connection with outbound shipments originating at points on the Lehigh Valley Railroad. Such carload rates are governed by the Official Classification, and in accordance with Rule 27, with certain exceptions, which will be specifically referred to later on, do not include the unloading from or the loading into cars at destination and origin, as the case may be.

Less than carload merchandise rates apply to or from Lehigh Valley depot or freight station and include the loading of the freight from the freight house into the cars and the unloading of the freight from the cars into the freight house.

Delivery of freight in less-than-carloads is made in cars to industrial tracks under the tariff provisions covering ferry cars pub-
416 lished as Rule 10–B, page 2, Supplement 9, to Lehigh Valley Railroad tariff I. C. C. No. C–8321. Said rule provides that ferry cars (which are cars containing less than carloads moved to or from a warehouse, industrial or commercial plant having track connection with the Lehigh Valley Railroad) will be moved at no additional charge over the published rate to and from the industrial track when cars are loaded with less than the minima prescribed in the tariff mentioned. When the car contains less than the prescribed minimum a charge of $4.50 is made. There are certain minor exceptions, which are not important and which are covered in detail in the tariff. Switching charges of the Lehigh Valley Railroad to all stations on its line are published in its tariff I. C. C. C–8431.

With respect to spotting, the rules are at all Lehigh Valley stations, aforementioned, tariffs provide that loaded cars, which have arrived, and been once placed for delivery at an industry and on which an additional spotting or placement within the industry is required by the industry, either to complete loading or unloading, the charge for such additional spotting is $3.15 per car. If the additional spotting or placement is required at a public or private track outside the industry, the charge is $6.30 (T. 973–975).

In stating the allowances we pay, I wish to make it clear that in using the word "allowance" I refer to a payment by the Lehigh Valley to an industry for performing a transportation service included in the through rate (T. 977).

The American Bridge Company, Buffalo, N. Y., receives an allowance of 61 cents per car, as authorized in tariff I. C. C. C–8247, and the Hanna Furnace Corporation, Buffalo, N. Y., receives
417 an allowance of 90 cents per car, as authorized in tariff I. C. C. No. C–8356.

The Wickwire Spencer Steel Corp., Harriet, N. Y., is reached by way of the New York Central under a contract with that carrier. Harriet, N. Y., is published in our list of stations, as being on the Lehigh Valley Railroad. While we have a right under the contract to operate over the New York Central tracks, we have never exercised it. Harriet is on the so-called Wonalancet Branch of the New York Central. There are three lines in the Wonalancet Branch arrangement, the New York Central, the Lehigh Valley and the Delaware, Lackawanna & Western. It is possible for the Erie Railroad to reach the industries in that vicinity, but they absorb the New York Central switching from their interchange at Black Rock. Our station at Harriet, insofar as relationship with the New York Central is concerned is the same as the Delaware, Lackawanna & Western, but that of the Erie differs from ours.

The Republic Steel Corporation, Buffalo, N. Y., receives an allowance of 90 cents per car; the Tonawanda Iron Corporation, North Tonawanda, N. Y., 71 cents per car, and the Wickwire Spencer Steel Corporation, Harriet, N. Y., 71 cents, tariff authority for the allowances being I. C. C. No. C–8356.

The plant of the American Bridge Company, Elmira, N. Y., is reached by us either through the Delaware, Lackawanna & Western or the Erie Railroads. This industry to which we pay an allowance is not listed as on our railroad in our tariffs, except this so-called spotting tariff (T. 979–980).

418 Warren Pipe & Foundry Company, Phillipsburg, N. J., receives an allowance of 80 cents per car, tariff authority being I. C. C. C–8348.

Wm. Wharton Jr. & Co. Inc., Easton, Pa., receives an allowance of 74 cents per car, tariff authority being I. C. C. No. C–8285.

Wickwire Bros., Courtland, N. Y., receives an allowance of $1.10 per car, tariff authority being I. C. C. C–8184.

Standard Oil Company of New Jersey, Bayonne and Constable Hook, N. J., receives an allowance of $2.10 per car, tariff authority being I. C. C. C–8208.

None of the industries listed in our tariff I. C. C. No. 8356, are reached by us direct; we employ other carriers mentioned in our switching absorption tariff. They are not listed anywhere. We cannot reach these industries with our own power, except by trackage rights over the New York Central. We do have the proper

trackage rights where we get to the Tonawanda Iron Corporation at North Tonawanda, and our line virtually ceases at a point outside of Buffalo, called Williamsville, specifically speaking, Tonawanda Junction is the end of our line. From there the trains run over the New York Central Railroad under a trackage agreement to Niagara Falls and Suspension Bridge. In the North Tonawanda arrangement we have the Tonawanda Iron Corporation, and we can make no physical delivery except through this intermediate switching (T. 981).

CROSS EXAMINATION

The inclusion of one placement under the line-haul rate is a custom of long standing, and the reason for applying the rate
419 to industries reached only through other carriers is the result of both rail and commercial competition. It is because of these competitive factors that we absorb the intermediate switching line charges in lieu of our own terminal.

That is true irrespective of whether at the particular industry located off the line of the Lehigh Valley there is a system of plant track, a private siding, or whether the industry performs the spotting service, or whether it does not. My replies intended that the rate to a given point where we are serving an industry via our own rails, the rate situation—the duty of the carrier is to make one spot on that private siding, when we leave our line to go to industries off the line of the railroad and serve by another carrier operating from the same territory from which we are operating there is one thing to do—either absorb the expense of reaching that or doing without the business. Competition is the answer. In some instances where some other carrier has to make delivery for the Lehigh Valley, we not only absorb the switching charges of the delivering switching carrier, but also whatever further charge is necessary to complete the service in the plant of shipper, and competition is the reason for such absorption. If we receive a shipment from a non-competitive point going to a point on another railroad, we could not treat that shipper differently and charge him more than someone at a competitive point. In that instance we would not be forced by competition entirely, but we hold ourselves out in our tariff to make that delivery. The traffic department determines how far the rate will carry the traffic and the extent to which these charges will be absorbed; also makes the determinations with respect to granting allowances; however, it often happens that the operating department calls the traffic department's attention to operations which are expensive, with the result that the traffic department might
420 substitute for such expensive operations by employing plant facilities (T. 986-988).

Where an industry is not reached by our own rails, but through an absorption of the switching charges of another carrier, such other carrier is regarded by us as an agent for the purpose of effecting

delivery and for that purpose we regard the industry as being located on our rails (T. 991).

Where we absorb the switching, we do not consider the industry as on our rails. We apply the rate published by the Lehigh Valley or its connections to that industry. We do not in fact regard such industries on our rails because there are so many other things that apply to industries off our rails that it is not necessary to include them as on our rails for tariff purposes, and they are not so listed in our tariffs.

Whether we would call an industry under double absorption, an industry on our rails, on the theory that we have two agents—the situation is the same. Two agencies of course acting in switching service for us can do things we can not do, because one of them serves the industry direct with its power, and we can not serve it (T. 992).

The places at which cars are to be spotted by the railroad on these industry tracks are determined by general usage and long-established custom, and in fixing the rates in our tariffs we have taken into consideration this general usage.

The Lehigh Valley has been following the rule handed down by the Interstate Commerce Commission in the Car Spotting Charges case 34 I. C. C. 609, as follows:

"The line-haul rate covers the customary movement of cars over industry tracks incident to the receipt and delivery of carload
421 freight at convenient points on those tracks for loading or unloading without regard to the sizes or complexity of the industry, and the points at which the cars are to be placed by the carrier for that purpose without additional charge are to be determined by general usage."

We have no tariff publishing an allowance to the Johns-Mansville Co. I know nothing about the plant of that industry.

Mr. Jasper N. Haines. That plant is reached by the Lehigh Valley Railroad, the Reading Company, and the Central Railroad of New Jersey; that the Lehigh Valley performs the switching which is covered by the line-haul rate. The average demurrage agreement applies at the plant, but whether it applies for all three roads I am not certain. It is often the operating department which calls the attention of the traffic department to operations of their own which are expensive and for which the operating department might be able to substitute a service to be performed by the industry. If the operating department should determine that it was more economical for carrier to perform the service than to pay an allowance, then the carrier would perform that service. In the case of the Standard Oil Company the operating department called our attention to such situation (T. 992–995).

422 Ira H. Hubbel, Assistant Traffic Manager, New York Central, was called as a witness, being first duly sworn, testified as follows: (Vol. 2, p. 1001.)

DIRECT EXAMINATION

I am Assistant Traffic Manager, with the New York Central Railroad. I have jurisdiction over that portion of the line, Buffalo and East. Our line-haul rates on carload freight include the placement of empty car for loading on public or private tracks, the switching of the loaded car from such tracks to our make-up yard, the switching of the loaded car from the break-up yard at destination to and including placement on public or private tracks at destination, and the switching of the empty car therefrom.

Our line-haul rates also include the use of derricks and cranes in loading or unloading heavy freight at various places along our line.

Our line-haul rates on less than carload freight include the loading and unloading through the freight house.

All of our tariffs showing class and commodity rates carry a clause stating the application of the rates, which we call the omnibus clause:

"Terminal and transit facilities, charges and privileges. The rates named herein apply from and to the tracks, stations, or other receiving and delivering points on this company's lines, or on the lines of other carriers parties to this tariff, or to or from sidings connected with lines parties to this tariff where the particular traffic is usually received or delivered, subject, however, to such regulations and charges, if any, for switching, terminal service, storage, elevation, refrigeration, icing, heater service, car demurrage, track storage, drayage, diversion, reconsignment, holding in transit, and all other charges or regulations at points of origin, destination, or en route which may in any wise change, affect, or determine any part of the aggregate of such rates, as well as any privileges or facilities granted or allowed, as are or shall be published in tariffs
423 issued by this company or by any of the carriers parties to this tariff and lawfully on file with the Interstate Commerce Commission, including car service charges applicable to the points in Canada, shown in Canadian Car Demurrage Rules, I. C. C. No. 2 (issued by W. J. Collins, Agent), supplements thereto and reissues thereof.

"The rates named herein will also apply from or to loading or delivering tracks and sidings, or other receiving and delivering points, on the lines of connecting carriers not parties to this tariff as published in tariffs issued by this company or by any of the carriers parties to this tariff and lawfully on file with the Interstate Commerce Commission and Canadian Railway Commission."

Ferry car service is furnished at many stations on less than carload freight in accordance with provisions of our Ferry Car Tariffs, I. C. C. N. Y. C. No. 16253 and I. C. C. W. S. No. 6638; in such cases our line-haul rates include the placement of the empty car for loading on private tracks, for switching of the loaded car from such tracks to our make-up yard or transfer or to our station freight

house, the switching of such loaded car from the break-up yard or transfer at destination to the freight house or to and including placement on public or private tracks, and the switching of the empty car therefrom (T. 1001–1002).

We make no allowance to industries switching their own freight except as follows:

At Buffalo—The Hanna Furnace Corporation—on all carload revenue shipments, also on cars containing 10,000 pounds or more of less carload revenue freight—90 cents per loaded car—when articles on account of length require two or more cars—allowance on first car 90 cents and 45 cents for each additional car, except where cars are loaded to their full or safe carrying capacity allowance is 90 cents.

On cars containing excess shipments of carload freight per Rule 24 of Official Classification, allowance 45 cents. Allowances not made on traffic handled under switching charges. Tariffs
424 I. C. C. N. Y. C. No. 16096, I. C. C. W. S. No. 6539, I. C. C. N. Y. C. No. C–438.

This allowance was formerly made to the Buffalo Union Furnace Company, predecessors of the Hanna Furnace Corporation, and was the result of the decision of the Interstate Commerce Commission, Docket 1023, 21 I. C. C. 621, and the name was changed to the Hanna Furnace Company on May 11, 1921.

We reach the Hamburg plant over our own rails. The Susquehanna plant is reached through the South Buffalo Railroad. We absorb the South Buffalo switching charge and make an allowance to the plant. We define our switching limits geographically rather than by the names of industries.

Buffalo, N. Y.—The Republic Steel Corporation, 90 cents per loaded car, 45 cents per excess cars, same conditions as apply in connection with allowance to the Hanna Furnace Corporation. (57 I. C. C. 745.)

At Harriet, N. Y.—Wickwire Spencer Steel Company, 71 cents per loaded car, and 35½ cents for excess cars, same conditions as apply in connection with allowance to the Hanna Furnace Corporation. This allowance was not based on any direct order of the Commission, but has been before the Interstate Commerce Commission in the complaints of the Buffalo Union Furnace Co. of the Donner Steel Company. Allowance based on 1915 costs.

At North Tonawanda, N. Y.—The Tonawanda Iron Corporation, 71 cents per loaded car, 35½ cents excess cars—same conditions as apply in connection with allowance to the Hanna Furnace Corporation. This plant was formerly the Donner Steel Company plant at North Tonawanda, was included in complaint filed by the Donner Steel Company, I. C. C. Docket 10420, and allowance result of decision of the Commission in that case, 57 I. C. C. 745.

425 At Troy, N. Y.—Hudson Valley Fuel Corporation, 43 cents per loaded car, 21½ cents excess cars—same conditions as apply

in connection with allowance to the Hanna Furnace Corporation, amount of allowance arrived at by study at the plant by Plant Facility Committee Trunk Lines, and is based on 1916 costs.

We do not reach the Donner Steel Company's plant—that is the Republic Steel Company now—direct. It is either through the B., R. & P. or the Pennsylvania, or the South Buffalo. We absorb the switching carrier's charges, and also make an allowance to the plant in order to accomplish delivery under the rate. This allowance was ordered by the Interstate Commerce Commission and we paid reparation under that order (1009–1013).

Assuming that the South Buffalo is our agent, and assuming further that they had a similar terminal allowance tariff, similar to our tariff, they would not make an allowance, because they would only get a switching service out of it. That is what our tariff says, and I assume the other tariff would be the same.

At Harriet, N. Y., we have another situation where the Lehigh Valley brings traffic over to us and we take it over to the plant and the plant does the switching. In that case the New York Central would not make an allowance under the tariff on behalf of the terminal service, because it would be contrary to the tariffs.

As to the theory of getting beyond our line and making an absorption and find out the reasons for making it, other than competitive reasons—the theories are not consistent. The theory under which this allowance is made, as I understand it, is that the industries are performing for the line-haul carrier a service which the line-haul carrier is under obligation to perform itself.

In regard to the Amsterdam, Chuctanunda & Northern, we apply a switching charge in addition to the rates to and from Amsterdam of $1.35 a car on inbound and outbound carload and less carload traffic, to concerns located at Forest Avenue terminal and private sidings leading therefrom. A charge of $2.25 per car on
426 traffic from the plant of the Bigelow-Sanford Carpet Company, and $3.50 to and from the tracks of the Mohawk Carpet Mills, Inc.

This railroad is operated by the New York Central under a lease. It used to be operated by the Kellogg Miller Corporation. These charges are in addition to the Amsterdam rate and are not absorbed by the New York Central.

We have considered the Genessee and Wyoming Railroad a common carrier, and we have through rates and divisions with them to practically all the territories, Trunk-Line, New England, and Central Freight Association territory.

We absorb the switching charges of the Massena Terminal Railroad, and that is shown in our regular switching absorption tariff. We have through rates and divisional arrangements with the Norwood & St. Lawrence Railroad to Trunk-Line and New England territory, and some to and from Central Freight Association territory.

As to the South Buffalo Railroad, the Buffalo rate applies to in-

dustries on the South Buffalo through our absorption provisions, in carload and less carload freight in accordance with our ferry car tariff. That is similar to the manner in which we reach other industries, like on the Lackawanna and Lehigh Valley, by absorption of their switching charges. We have through rates and divisions with the Susquehanna & New York Railroad, which is a common carrier.

In regard to the Subway Railroad in Rochester, which is operated by the New York State Railways, the charges in some instances are $6.30 and in others $10 a car. The New York Central absorbs these charges because the Subway is electrified and we cannot operate there (T. 1014–1018).

427 As to whether our switching tariff, which the Lehigh Valley absorbs, cover delivery within the plant of the Tonawanda Iron Company, or merely to the interchange track, my recollection is that the Lehigh Valley Railroad has a trackage contract over our rails between a point just north of Williamsville, which is the northern part of Buffalo, to Niagara Falls, and that would include North Tonawanda, and our switching charges apply to and from private sidings at North Tonawanda on traffic moved over the Lehigh Valley Railroad. I would say that our switching charge applied to that industry. We don't make an allowance, because we don't make an allowance on freight switched. Our switching charge would cover delivery to the plant. Our switching tariffs will take a shipment to the regular interchange track.

We are being paid for performing the service to the plant under the switching tariff, and our rate includes delivery at the private siding—so that our tariff includes compensation for delivery within the plant, and the Lehigh Valley pays us for that service—that is, they absorb our switching charges (T. 1019–1020).

CROSS-EXAMINATION

428 The points at which the cars are to be placed by the New York Central under its rates for unloading and loading upon industry spurs are determined by general usage, by the provisions of our tariffs, and the principle in the Car Spotting case. And as established by general usage our rates contemplate delivery at convenient points on the track for loading and unloading (1021).

Q. In fixing your commodity rates, I assume that you also take into consideration the element of competition between the industries on your line with competitors on other lines—fixing the rate on a specific commodity—whether it is coal or steel or the raw materials out of which the products are manufactured—you take into consideration the industries?

A. That is a very important factor. Never omitted.

Q. And you also take into consideration the services that are performed under these rates as set up under general usage, do you not?

A. Oh, yes; to some extent.

Q. Don't you to a full extent? In determining the rates, you have to determine just what services you have to perform?

A. Yes, sir; but competition is a very important factor, in fixing all commodity rates. We endeavor to feel that we are a partner in every institution on our line. We are a public servant. I would not say that competition is controlling; I would say it is a very important factor (1022).

On the Amsterdam, Chuctanunda & Northern a charge is imposed in addition to the line haul rate. The reason for that is that that line was built by the Kellogg & Miller people. It runs from a point about a half mile east of our Amsterdam station on the main line, up the hill. If you are familiar with the Mohawk Valley, you will know that the New York Central runs through the Valley, and there are hills up in that part of the Valley. This industry runs up the hill to the industry, Kellogg & Miller, which was located in the back part of Amsterdam. This railroad was built for the purpose of serving that industry. Subsequently, there were some carpet mills—Amsterdam is a carpet manufacturing city—located further up there. McCleary & Crouse, now the Mohawk Carpet Company, and the rails were extended out to this carpet mill. Then, a little below the Kellogg & Miller plant, was the plant of Stevens Sanford. They now have another name for it—Sanford Bigelow Company—

429 something like that—and the rails were extended there.

Originally, the charge was $1.35 to the Kellogg plant, and to Forest Avenue terminal and the north it was $3.25. To the Sanford Mill it was $2.25.

Those charges were made by the Amsterdam, Chuctanunda & Northern when it was owned and operated by the Kellogg & Miller people. It was taken over under a lease by the New York Central, and we merely continued those charges. No other railroad serves Amsterdam or reaches those industries (1024).

There are quite a number of situations along the New York Central where the rates applicable from the points on the short line railroad are based upon the combination locals to the junction with our line. I cannot recall any situation at that time where the short line railroad is reached by any other railroad than the New York Central (1024).

430 In reference to the rates published by the New York Central Lines to and from points on its line where the destination—or the origin of the traffic would be off its line, and might be reached by some other line, it is our general practice to absorb switching charges of the switching carrier.

The reason for this is that we wish to give our patrons, the people whom we serve, as broad and as wide deliveries and as great a scope of markets as possible. In our kind of switching absorption, we have no limitation, except a revenue and weight limitation. We do not confine it to competitive or non-competitive traffic.

We would absorb the switching charges on traffic originating at a local point on our line destined to a point local to our line, but for

delivery upon connecting line tracks provided that the line-haul revenue was of a certain figure, which I know it would be in the case of carpets, and of a certain weight. That is our practice generally (T. 1023–1025).

The traffic department determines the instances wherein the switching charges of connecting lines will be absorbed. Our whole object is to give our patrons as broad and as comprehensive a service as possible, and sometimes it may be that we do not get a new

431 dollar for an old one out of it, but in the long run we do.

When you come to figure in each case as to whether it is profitable or not profitable—we will say we get $15 for a road revenue haul. That $15 is not qualified as to the distance hauled. The only feature of that that would have any bearing on the distance hauled is the weight feature. That is all (T. 1025–1027).

The practice of the New York Central is to absorb the charges of our connecting line carriers, not only the trunk-line carriers, in performing the service, but also the short line railroads, as provided in our tariffs, on business to and from non-competitive stations on the New York Central. Those allowances haven't anything to do with the switching absorption.

432 The line haul rate has included the industry track spotting and delivery, to my knowledge, since I can remember. I don't know whether you want to know how long I was in the railroad business. I can speak of my own knowledge from forty-eight years (1034).

Q. You never made a spotting charge for placing——

A. Yes; we never made a spotting charge as I remember it until after the decision in the Industrial Railways Case.

Q. And that spotting charge was condemned by the Commission and the tariff stricken from its files?

A. Well, the railroads misinterpreted the decision, and I believe we were spanked rather thoroughly as a result (1034).

433 David B. Fleming, Assistant General Manager, New York Central Lines, was called as a witness, being first duly sworn, testified as follows (Vol. 2, p. 1040):

DIRECT EXAMINATION

I am Assistant General Manager, Lines East of Buffalo and Clearfield.

A map of the New York Central System was received in evidence and marked "Carriers' Exhibit No. 88, Witness Fleming."

I have been in the Operating Department of the New York Central Railroad for 38 years. The service performed by the New York Central at Buffalo is typical of the various kinds of services performed by the lines East, except at New York.

We have an industrial common carrier at Buffalo. Then we have industries that perform their own switching, to whom we give an allowance. We have industries who perform their own switching

to whom no allowance is paid. Then we are getting industries that we switch on the line-haul rate. We have also industries having a system of tracks where we do all of the spotting. The industrial common carrier at Buffalo with which we connected is called the South Buffalo Railway.

The industries which do their own switching and receive an allowance are Hanna Furnace Corporation, Wickwire Spencer Steel Company, Inc., Republic Steel Corporation, located on the Delaware, Lackawanna & Western, the Buffalo, Rochester & Pittsburgh, and the South Buffalo.

The industries that perform their own service to and from a specified interchange track, but receive no allowance, are Buffalo General Electric Company, Buffalo Slag Company (Louisiana Street), Dunlop Tire and Rubber Company, Dupont Rayon Company, and Semet Solvay Company.

There are approximately 80 industries at Buffalo having a system of tracks where we do the spotting. And there are approximately 140 industries at Buffalo each having a single spur track (T. 1040-1041).

434 The South Buffalo has an interchange similar to that which occurs at any railroad interchange. There are certain tracks designated for delivery to the South Buffalo, and they deliver on their tracks to us. The South Buffalo serves the following industries: Arrowhead Piston & Pin Company, Bessemer Cement Corporation, Bethlehem Steel Company, Bliss & Laughlin, Inc., Bouley & Buck Lumber Company, Buffalo Brake Beam Company, Buffalo Litholite Company, Buffalo Sintering Corporation, Buffalo Slag Company, Inc., Buffalo Tank Corporation, Consolidated Battery Corporation, J. D. Cousins & Sons; Donner Manna Coke Corporation, Gas Gardens, Hanna Furnace Corporation (Susquehanna Plant), Kalman Steel Company, Maritime Milling Company, McClintic Marshall Company, Presto-Lite Company, Republic Steel Corporation, Joseph Schonthal, Seneca Iron & Steel Corporation, Tifft Lumber & Supply Company, and Western New York Water Company.

Cars taken from the South Buffalo are taken to the Seneca Yard of the New York Central, which is located adjacent to the interchange.

The traffic handled by the New York Central to the Hanna Furnace Corporation, inbound, is iron ore, scrap iron, fluxing stone, coal, and coke; outbound, pig iron. The plant track capacity is approximately 300 cars. This plant at the time of this hearing was not in operation, having been shut down about a year before. Outbound shipments of pig iron are being made from stock. Service performed: Cars from New York Central for Hanna Furnace Corporation arrive in Buffalo yard, where they are assembled and placed by New York Central power on interchange tracks of Hanna Furnace Corporation. Cars from Hanna Furnace Corporation are placed by Hanna Furnace Corporation power on interchange track, from which point

they are pulled by New York Central power to Buffalo Yard of the New York Central, switched, and moved to destination. We have an understanding with the Hanna Furnace Co. for our mutual convenience for delivery on the interchange. They have never asked our power to go into the plant and we have never asked to go in. They did their own switching previous to getting an allowance (T. 1042–1044).

435 It is my understanding that the Susquehanna plant is located on the Lackawanna, the South Buffalo, and possibly one other road, and if the cars are routed via one switching road, we make the delivery to that road, in accordance with the billing.

The principal inbound commodities to the plant of the Wickwire Spencer Steel Company at Harriet, N. Y., are iron ore, scrap iron, fluxing stone, coal, and coke. The principal outbound commodities are pig iron, wire rod, steel wire, wire fencing, concrete reinforcing bars and mesh, and wire nails. The interchange track is right adjacent to the Wickwire plant and cars are pulled from there by Wickwire power. The plant is located on the Wonalance branch. The Lehigh Valley and the Lackawanna have equal rights with the New York Central.

Principal inbound products to the Republic Steel Corporation at Buffalo are iron ore, scrap iron, fluxing stone, coal, and coke; and outbound, pig iron, billets, bars, and plates. Cars arriving in Buffalo territory via New York Central are delivered to road as billed, such road making delivery to Republic Steel Corporation.

At Troy, N. Y., where an allowance is given we place the cars on an interchange track which is just east of the Troy yard, that is, in the immediate vicinity, and pull the cars from the interchange track at that point (T. 1044–47).

436 The industries on the lines east other than those at Buffalo, which do their own switching, but receive no allowance are Standard Brands, Inc., Peekskill, N. Y.; Acme Cement Company, Alsen, N. Y.; North American Cement Company, Alsen, N. Y.; New York Power & Light Company, South Amsterdam, N. Y.; L. & N. Stone Company, Prospect; U. S. Gypsum Company, Oakfield; Eastman Kodak Company, Rochester; Gleason Works, Rochester; Buffalo General Electric, Harriet; Buffalo Slag Company, Harriet; Buffalo Slag Company, Buffalo; Dupont Rayon Company, Black Rock; Dunlop Tire & Rubber Company, Black Rock; International Paper Company, Tonawanda; Semet-Solvay, Harriet; Vanadium Corporation, Suspension Bridge; Oswego Falls Corporation, Fulton, N. Y.

At Buffalo we have freight stations at Louisiana Street, Carroll Street, and Erie Street and also facilities at Black Rock. In addition to that we have team tracks located at East Buffalo and one or two on the Belt Line.

The American Locomotive Company at Schenectady has three side track connections with the New York Central, one on the main line, located 1.27 miles west of State Street yard, and this interchange

is approximately 1,500 feet long, that is, the track, and they interchange commodities, with the exception of coal for their heating plant and locomotives. Connection from the T. & S. branch, .87 mile from our State Street yard, where they interchange locomotives in and outbound. Capacity of this track is 12 cars. The capacity of that first track I mentioned is 50 cars. The heating plant track, located outside main plant area and on opposite side of main line tracks, T. & S. branch. The distance is 1.06 miles from our State Street yards. Coal for heating purposes only placed on this track. The capacity is 7 cars (T. 1047–1049).

437 We place on the first two tracks and perform whatever switching is necessary beyond. We make the final placement of cars on the third track. No allowance is made to this company.

The Benson Mines Company was abandoned December 18, 1918. The Brooklyn Cooperage Company at Tupper Lake, N. Y., discontinued operations in 1922.

The Burden Iron Company at Troy, N. Y., has a private side track connection with the New York Central Railroad. The distance from the Madison Street yard to the interchange track is .36 mile. The capacity of the track is 100 cars. The character of the traffic handled: Inbound, carloads, iron and steel articles, pig iron, coal, and miscellaneous. Outbound, carloads, bolts, horse shoes, and bar iron. Less than carload trucked by Burden Iron Company to and from Troy freight house. The New York Central power delivers and receives loads and empties on interchange track. Industry's own power handles within plant to and from interchange track. Railroad makes no allowances.

The Carthage Pulp & Board Company receives coal, waste paper, and wood pulp, and ships wrapping papers, chip board, bag paper, and paper bags. We interchange on an understood interchange track. They place their own cars and we pull their cars from the interchange. No allowance is made. They perform switching for the Champion Paper Corporation, and Taggert Brothers Company, subsidiaries of the St. Regis Paper Company. We make no allowance to the Champion Paper Corporation or to the Taggert Brothers Company.

At Lock Haven, Pa., the Lock Haven Brick & Tile Company coal and clay shipments are received. All switching is performed by the carrier to and from their plant. This is the common ordinary private track arrangement.

The railroad company handles cars to and from the Alpha Portland Cement Company's interchange track along side of the railroad right-of-way, at Cementon, N. Y. The plant is located over

438 one mile from the railroad right-of-way. The industry performs its own service between the interchange track and the plant, for which no allowance is made to the industry by the railroad.

Operations of the Central Dock & Terminal Railway have been entirely discontinued. The same is true of the Central Railroad of Pennsylvania, Mill Hall, Pa., the Cornell Company, and the Cran-

berry Lake Railroad, and the DeGrasse Paper Company-International Paper Company, successors, ceased the manufacture of paper in July 1930. The railroad is continued in operation for the purpose of shipping out pulpwood stock and machinery. (T. 1049–1052).

DIRECT EXAMINATION

(Continued, Vol. 2, page 1055)

The DeGrasse Paper Company is under the average agreement. The Dexter Sulphite Pulp & Paper Company, Dexter, N. Y., handles pulpwood, coal, wood pulp, sulphur, stone, paper, and paper bags. Interchange made with the Dexter & Northern Railroad, who perform all switching for the Dexter Sulphite Pulp & Paper Company. No allowance is made, demurrage handled on average agreement.

Elk Tanning Company, Clearfield, Pa., manufacturers of hides, extracts, and bulk received. Tannery has been closed since October, 1929, no manufacturing, but has been shipping an occasional car of leather. Carload business only. Cars are placed and received on interchange track, switching performed by the industry; no allowance made to the industry for the work. Demurrage on straight basis.

Empire Gas & Electric Company (Associated Gas & Electric Company), Geneva, N. Y., Township of Waterloo. Cars are delivered and received on the interchange tracks. Switching is performed by the industry. No allowance is made; straight car demurrage, average agreement. Commodities handled coal, coke, tar, ammonia liquor, benzole, and gas.

439 Fort Orange Paper Company, Castleton, N. Y. Industry performs its own switching between interchange tracks, assembly in both directions. No allowance is made to industry. Demurrage applied on the average agreement plan.

General Electric Company, Schenectady, N. Y. Main plant with spurs from our State Street Yard, distance .55 mile, connects with General Electric interchange tracks. Character of traffic handled, inbound, carloads, and less than carloads, iron and steel articles, sand, oil, lumber, stone, copper, brass, coal, gasoline, asbestos, cement, clay, cable, wire, paints, and varnishes. Outbound, carloads and less than carloads, refrigerators, generators, turbines, other electrical appliances and machinery. Inbound less than carloads received at our freight house and trucked by General Electric Company to plant, except on Saturdays and Mondays, when ferry cars are made up and forwarded to plant. Outbound ferry cars made at plant, handled in accordance with ferry car tariffs. The industry performs all of the switching beyond the interchange track. No allowance is made by the railroad.

Genesee & Wyoming Railway approximately one mile west of Caledonia Station, N. Y., common carrier. They are under per diem reclaim arrangement in accordance with I. C. C. 17801.

Halcomb Steel Company, manufacturers of high speed steel, Syracuse, N. Y. The industry performs its own switching and no allowance is made to the industry in connection therewith. All service for this industry is performed by placing loads and empties on interchange tracks and receiving loads and empties from the interchange tracks. Demurrage under the average plan.

Haynes Run Fabric Company, now General Refractioner Corporation, Orviston, Pa. Brick manufactured and shipped out, coal and clay shipments received. Switching performed by road crew. Demurrage, average basis.

440 Service for the Fort Montgomery Iron Company is performed by the railroad. Demurrage is on the straight plan rule.

International Paper Company, Piercefield, N. Y. Character of traffic handled, materials necessary for the manufacture of paper. They perform their own switching and no allowance is made. Demurrage is handled on the average basis. Cars interchanged on designated tracks (T. 1055–1058).

Johnston Harvester Company, manufacturers of farm implements, now Massey-Harris Company, Inc., Batavia, N. Y. This industry performs its own switching service ordinarily at main plant and no allowance is made to the industry in connection therewith, but since August 1, 1931, the railroad company has been performing the switching service in the main plant, on account of the industry's locomotive taken out of service. This industry has a lumber yard on the opposite side of the New York Central main tracks from the main plant, which is at all times switched by railroad power. When the plant switching at the main plant is performed by the industry, inbound loads and empties are placed on the Massey-Harris Company's private warehouse siding or on railroad lead track parallel to it and removed by the industry's engine for placing, and outbound loads and empties placed by the industry's engine on either of these two tracks and taken away by the railroad company's engine. Demurrage, average plan. I might say that their in and outbound cars will average about 11 at the present time for the month. Outbound business is very light.

Massena Terminal Railroad performs switching service for 8 different industries. Business principally carloads, although some ferry cars are handled. Interchange is made by road shifting engine daily except Sunday. Settlement made on per diem basis, as described in Commission's docket 17801. The New York Central absorbs $5.00 per car switching charge of the Massena Terminal (1058).

441 At the Universal Atlas Cement Company plant the railroad company places inbound cars for industry on tracks that enter to railroad yard on each side of railroad right-of-way; about one mile from industry's plant the railroad company removes outbound cars from same track, these tracks being known as interchange tracks. The industry performs its own switching between interchange

tracks and plant in both directions. No allowance is made by the railroad for switching performed by the industry. Average demurrage plan. They have separate agreements with the Boston & Albany and the New York Central.

New York Lime Company. Basic Refractories Corporation, successors, Natural Bridge, N. Y. Basic Refractories Company manufacture dolomite. Less than carload freight handled at freight station. They handle their own switching; no allowance is made. Demurrage handled on average agreement.

General Refractories Corporation, Beech Creek, Pa., brick manufacturers and ship out brick. Coal and clay shipments received, carload business only. Switching performed by New York Central road crew; demurrage on average basis.

442 St. Regis Paper Company, Sterlingville (Herrings), N. Y., receives wood pulp, coal, alum, pulp wood. Ship bag paper and wrapping paper. Less than carload freight handled at Carthage freight house as well as ferry cars. They perform their own switching at their plant, located at village of Deferiet, 2.3 miles from interchange track, also switch plant of Taggart Bros. Company, a subsidiary of St. Regis Paper Company, located at village of Herrings, 1½ miles from interchange track, which is also operated by St. Regis Paper Company. No allowance is made; demurrage handled on average agreement for each consignee separately. Interchange tracks located at Herrings, 4 miles east of Carthage. Carthage rates apply.

Solvay Process Dye Company, a subsidiary of Church & Dwight, an independent industry. All cars inbound and outbound handled through and by the Solvay Process Company. The industry performs its own switching service and no allowance is made to the industry in connection therewith. All of these cars mentioned above, both loads and empties, are placed on regular designated interchange tracks. Demurrage on the average plan.

As to the Commission's statement in the Car Spotting Case, 34 I. C. C. 609:

"The service involved in the placement of cars for loading or unloading on isolated industries to which a single spur leads,

443 may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks", on a car basis that has been borne out by my experience.

The Commission further said:

"Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage, the cost of spotting at the larger industries is less per car than at the smaller industries", that has also been borne out by my experience (T. 1061–1062).

CROSS-EXAMINATION

As a general proposition the industry elects as to whether or not it will perform the switching within the plant. That has been

rather an old practice. In one case where we put in a plant alongside of our own line, where the switching had to be performed by road crews, and before they located the plant, an arrangement was made that they were to do all of their own switching so as not to tie up the main line.

444 I do not know of any instances along the line of railroad within my jurisdiction where we would not enter the plant at the request of the consignee or the shipper and perform the spotting service, apart from operating disabilities that would prevent our locomotives going into the plant and spotting the car. We have done that here in the case of the Johnston Harvester Company at Batavia. The only instances where we do not enter a plant when requested to do so, is where there are some operating disabilities within the plant that will not permit us to enter (1064).

After we put these cars on the interchange track, then so far as our operation is concerned with the plant, where they take these cars at the interchange track, that is, as to how they handle them and what arrangements they have for taking these cars out, that is a detail that they handle (1064).

There are some plants describing my testimony where the New York Central performs the service inside of the plant, but it would not be a similar operation when we take the cars to the plant. We put the cars in on their track and leave the cars on the track as instructed by the industry. In other words, our industry will tell us that they want certain amounts placed on one track and a certain amount on another track, such as coal, or grain, or in the case of anthracite coal, they may have a chute on their bin—egg coal, chestnut coal, etc. We place those cars to meet their convenience, but it must be remembered that there are very few industries that do not perform a certain amount of switching inside of their plant. For instance, if we have two or three cars of egg coal for one plant, after they get one car unloaded, they pull the other car down by truck or horse or some manner; they may drop them down by gravity. There are very few plants that perform any amount of business that do not have to do more or less switching inside of the plant (1064).

Where the New Central performs the spotting, we place the cars on the tracks where they are going to be unloaded or loaded. Where the plant performs the service, we put them on the interchange track at the gate of the plant or in that vicinity (1065).

Q. Where you perform the service on the plant tracks, do you do it on some switching orders or switch list that you get from the industry, or how do you know in what order to place those cars?

A. As a general proposition, the industry lets know in advance. Maybe a year or two ago. They wanted to place their oil

445 on one track, the molasses on another track. The yard crew knows where these different commodities go, take them up there and put them on those tracks. A standing understanding as to where the cars go (1066).

Being asked to say whether we regard three classes of service (first, where we place the cars at the interchange track at the gate of the plant; second, where we make the placements within the plant; and third, service on ordinary private sidings) as a substitute for the team track service; it takes the place of the team track service (1067).

The easiest operation is to place the cars on an interchange track at the plant that does the switching, because those cars are just assembled in the way they come in and shoved in on that track. That is the easiest operation. Easier than team track (1067).

There is little difference between an industrial track or a spur and team track, because on the team track we have more or less spotting to do, such as automobiles and cars requiring crane unloading, or some instances where we have platforms at our team tracks, where meat is unloaded, other places where chickens are unloaded and they are taking team delivery at certain spots where they can be handled, where we have facilities for handling different commodities, so all in all it is about on the same basis (1067).

We gave you testimony here about 240 tracks in the Buffalo territory—about 220 or 221, and of that number there is relatively a small number that perform their own switching. It is the exception rather than the rule that the industry performs the service for itself, except as I have enumerated, where most of our industries do a certain amount of spotting (1067).

Public team tracks are located upon land belonging to the railroad, while private spur tracks are usually located upon land belonging to the industry. Our rates usually include delivery of cars upon our public team tracks. Those are the rates we assess on traffic received and delivered on private spur tracks (1069).

446 The New York Central performs the service for the Lehigh Valley in reaching the Tonawanda Iron Company. Mr. Fleming resumes:

The Lehigh Valley's switching charge applied to the industry rather than to the interchange track, and the reason we do not deliver the cars to the industry instead of the interchange track is because the industry likes to take the car on the interchange track. In other words, Mr. Director, if we are going into this plant and doing the switching, our crew gets its instructions from the yardmaster or the agent, whoever may be in charge, and when they are inside of that plant, the industry does not have the same control over them as they have of their own crew, so at a large plant it is necessary that they get this work done quickly. If some special thing comes up, they have their own crew do it. That has been my understanding why they elected to do that. They relieve us of the responsibility of doing the switching even though they do it for their own convenience. We pay an allowance in some instances. The Tonawanda Iron & Steel Company gets an allowance. The industry elects to take the cars from the interchange track, and we are glad

to have them do it. We have an understanding with them that they will take delivery on the interchange tracks—whether they receive an allowance or not (T. 1066–1069).

Mr. HUBBELL. In trunk line territory, along the line of the New York Central Railroad, we gave the allowance to certain iron and steel plants. That was caused by the competition which those iron and steel plants along our line had with plants in the valleys, at Cleveland, Pittsburgh, etc., and it was founded on the decision of the Interstate Commerce Commission in the old Buffalo Furnace Company case. Whether or not, if it were not for the decision in the Buffalo Furnace Company case, these competitive influences that you refer to, that we would not make the allowance—we do not pay out any money that we can retain, and the question there of course is not only the question of common carrier competition, but also the competition of the steel plants between themselves.

447 Director BARTEL. In other words, the reason for the absorption, as I understand it, is because of some decision of the Interstate Commerce Commission, plus carrier competition?

Mr. HUBBELL. That is the reason, yes (1071).

I said the simple service was where we placed the cars on the interchange track and the industry performed the service within the plant. I said that the track spurs for the plants and the team tracks per car unit was very little difference.

Q. Are they greater or less burdensome in the matter of operating performance than where your company performs the service on the industrial track within the plant?

A. Per car there is no difference practically. On an average be about the same (1075).

Director BARTEL. Now, take your spotting service—local spotting service—I mean where you get the line haul and you perform the terminal service to some industry, as I understand you normally would not make a charge for that service?

The WITNESS. We do not (1078).

The rates on steel from the Buffalo district, for example, bear a relation to the rates on similar products from the Valley districts. These rates on iron and steel were fixed by the Commission in Docket 17000, Part 6. In fixing those rates I think that competition was a very important consideration. The rates from the Buffalo district are on a group basis. The Buffalo group runs east as far as Batavia, takes in the Niagara Frontier and out I think a little east of Dunkirk. The rates are applied indiscriminately to all industries in the group no matter on what railroad they are located, private industry, spurs or public team tracks (1083–4).

448 Any restriction by the line carriers to stations on its own line would naturally interfere with the freedom of the commerce, or with our ability to compete with trucks and the ability of these industries, so far as they are able to compete; they can't use

the trucks with other industries on our line and vice versa. It would create a sort of chaotic condition in the industry in general (1085).

Q. Mr. Fleming, you stated during the course of your examination, I think it was by Mr. Hagerty, that where your line does the spotting in a large industry having a system of tracks, you customarily did a part of the work in your train yard in the classification of cars, so that when you arrived at the industry you could place those cars with the minimum effort, where as when you made delivery to an industry doing its own switching on its interchange track, there was no such classification. Did I understand you correctly?

A. That is true.

Q. You do the former, I suppose, because at some time or place the cars that are to be particularly spotted have got to be separated from the mass of cars with which they may have become mingled in their movement, is that right?

A. That is right (1085).

Q. Is it not a fact that the greater number of cars that you can put in on an industrial track with a single movement, the less time is consumed in the marking of that spot?

A. The most number of cars you can put on at a time that is true, with the least amount of effort (1086).

Our team track facilities are adequate for the loading and unloading of all carload team track freight in our district but they would not be if the private sidings were discarded and we undertook to do that business on the team tracks. You could not
449 possibly take care of all the freight and you could not get the business if you undertook to do it that way (1087).

You could probably get the land to extend the team track facilities, but it would be expensive and would not be satisfactory to anybody (1087).

There have been times when our team tracks have been congested and we had to hold cars back for delivery to team tracks because they were full but it was a good many years ago (1087).

We have outlying team tracks in many cities, located some distance from our main yard. During the war when the team tracks were full, we held the cars wherever we had a place to put them. Where we would hold a car intended for a team track which was full, would depend on the conditions that day and what our engines were doing. The same conditions govern the place where we could take any cars which might be destined for an industry whose tracks were full on the day on which cars were received (1088).

450 C. L. Ewing, Freight Traffic Manager, Central Railroad of New Jersey, called as a witness, being first duly sworn, testified as follows (Vol. 2, p. 1159):

DIRECT EXAMINATION

I have been in railroad traffic work over thirty years and with the Jersey Central approximately the same time. I have carefully read the order of investigation and I am prepared to respond so far as the Jersey Central's traffic affairs are concerned (1160).

I will now take up the matter of industrial common carriers with whom the Central Railroad of New Jersey has direct connection, the location and operating conditions having already been fully covered by Mr. Brown (1161).

NOTE.—The Witness then stated facts concerning the Chestnut Ridge Railway, Northampton & Bath Railroad, East Jersey Railroad & Terminal Company, the Mount Hope Mineral Railroad, the Ironton Railroad, the Wharton & Northern Railroad, and the Philadelphia, Bethlehem & New England Railroad (1161–1166).

Mr. Brown has testified as to the number of industries served by the C. R. R. of N. J. who do all of their own drilling and those who do part of their own drilling. Of the industries who do all of their own drilling, there are three who receive an allowance for spotting cars, the Warren Foundry & Machine Company, at Phillipsburg, N. J., William Wharton, Jr., & Co., Inc., at Easton, Pa., and the Standard Oil Company of New Jersey, at Bayonne, N. J. The allowances to those industries are published in the following tariffs, I. C. C. Nos. A–859, 916, and 881.

At the Wharton Bros. plant the tariff provides that on
451 carload revenue shipments, also on cars containing 10,000 pounds or more less-carload revenue freight destined to or coming from the plant of the Wm. Wharton, Jr., Inc., at Easton, Pa., the latter company performs the terminal switching service for account of the Central Railroad Company of New Jersey and it allowed for such service out of the current Easton, Pa., rates 74 cents per loaded car, which includes the handling of the empty car in the reverse direction. That allowance is paid to complete the transportation service for loading or unloading just the one placement (p. 1176).

The allowances are fixed by the connecting line carriers of the industry after they have made a cost study of the cost of operation if the carrier performed the services versus the cost if the plant performed the service. That is the fact in reference to the allowance by the Central Railroad of New Jersey at these specified plants which I have mentioned. The matter of allowances are referred to the Trunk-Line Committee put on the public docket for objection, and then they are put in the same as any other rate changes. It is a traffic department matter but mostly an operating department matter. The traffic department would not say that the operating department should go in and perform the switching in a plant without consulting them. But whether or not the plant should receive
an allowance and how much is something that largely falls
452 within the jurisdiction of the traffic department.

With reference to the service to these three plants to which we have now made an allowance it is my understanding that they would have permitted us to perform service, otherwise they would not have been given an allowance for performing their own switching. If we could not have gone into the plant we could not have been in a position to make an allowance to them for doing the service. As to whether or not we could perform the service at our convenience or at the plant's convenience, my understanding is that if we had preferred to do the switching at these various plants rather than make an allowance for that service that mutual satisfactory arrangements would have been made between the industry and the carrier for the time at which the carriers were to serve them. It is a fact that one of these three industries (Standard Oil Company) requested, before this investigation was started, that in lieu of the allowance we take over the switching. That obligation is still under consideration. That is, it was turned down but is still being pressed. I mean by that that we were not favorably impressed in regard to doing the switching in that plant and we had not acceded to that so far. As to why we haven't acceded to it if it is our obligation, I would say at the present time we are getting it done cheaper and we are reluctant to perform the service because of the investigation that we are conducting. An investigation is necessary to find out what the service contemplates at this time, how much switching we would have to do, and when we have to do it (p. 1179). The line-haul rate would include the service. We are not hesitating about performing it but we have got to go into the situation very carefully to see just what we have to perform. It is simply a matter of negotiation between the industry, the Lehigh Valley, and the Jersey Central. As to why we hesitate about performing the service I would not say that we held it up. It is a matter of negotia-

453 tion at the present time. We have the right to select the agency through which the railroad performs the service (p. 1180).

The fact that there is more than one carrier that serves the plant may have some bearing although the two lines are working in harmony with the industry. I don't think they would have the two lines perform the service into the plant gates with their own power. The service would probably be performed by one line for a certain period and by another line for the next period. That is one matter to be settled and is a necessary part of the settlement. Assuming that when we get through with these negotiations if the determination is that we will not make them it will be because we can't do it and our study in the past has indicated that we could do it. If conditions have changed and we could not do it we would not make an allowance (p. 1183).

454 There are some instances where the Jersey Central does the spotting in a plant that is also served by the Lehigh Valley or the Pennsylvania. We do it alternately, to the best of my knowledge, monthly or quarterly, and pool the power. One month the

Jersey Central would do it and the next month the Lehigh Valley. That service is performed under the rate (1182).

Q. All of the rates of the Central Railroad of New Jersey and the joint rates in which they participate to and from points on our line are applied under our custom as including your delivery at one spot or location at the industry where delivered? I have reference to carload freight, of course.

A. Yes.

Q. Does your traffic department regard that as a substitute for delivery on the team track and is that the reason for applying the rate to the industry?

A. Regardless of whether—no matter how we regard it, it is a substitute for delivery on team track, in one sense.

By Director BARTEL:

Let us take an industry that does the switching with its own power and gets no allowance. You place those cars on the interchange track, do you not?

A. Yes.

Q. Are those interchange tracks accessible for trucks for unloading purposes?

A. I should say they are not.

Q. As far as the team tracks are concerned, they are accessible?

A. Yes.

Q. That may be a possible distinction of the delivery track and the industry track.

A. That would be a difference, yes (1193–4).

Q. In respect to the industries that perform the spotting service with their own power which receive no allowance, what is the reason for making an allowance in some cases and no allowance in others?

455 A. Well, wherever they do their own spotting and get no allowance, it is—the first thing is that they probably have not asked us to do the switching for them, and we, of course, naturally would not make an allowance to them when they are doing the switching without question.

Q. Could you physically enter those plants with your own power?

A. I don't know that, Mr. Director. If they did not ask us to do the switching and no question was raised, there would be no question to determine whether we could or not.

Q. But you could do the physical switching at the plants where you do make an allowance?

A. Oh, yes (1194).

456 A. T. OWEN, Superintendent of Transportation for the Reading Company, called as a witness and having been duly sworn testified as follows (Vol. 2, p. 1204):

I have occupied my present position for almost 10 yrs. I have classified the industries as to the particular classes in which they fall as requested by the Commission (1204).

I will show first the list that was sent to us which states those industries now out of operation. List read (1204).

Taking up the industrial common carriers that are still in operation, the Pennsylvania Steel Company, now the Bethlehem Steel Company, is served by the Steelton & Highspire Railroad Company, a common carrier located at Steelton, Pa. Trackage 43 miles. We deliver and receive cars from this line at Steelton, Pa. on regularly designated interchange tracks, which are an extension of our Steelton Branch tracks. Cars reaching such interchange tracks in switching drags from either P. H. & P. Junction, or Rutherford, Pa., three and seven miles, respectively. This road is also served by the P. R. R. The cars are handled under per diem Rule 5 and we allow an arbitrary switching reclaim of 2.32 days per car. Practically all of the track of this railroad is within the plant enclosure, so we include in the reclaim period the time necessary to spot at the various points within the industry, from the time the cars are placed on the interchange track until they are returned to us (1206–7).

Philadelphia, Bethlehem & New England Railroad, trackage 72.7 miles, a common carrier. We interchange cars with this line at Bethlehem, Pa., via two junction points known as Saucon Junction and South Junction, situated about a mile apart (1207).

At Saucon Junction, all carload traffic consigned to and received from the Lehigh Plant, Saucon Plant, and Air Reduction Sales Company, is interchanged.

457 At South Junction all carload traffic consigned to and received from the Northampton Plant, National Slag Company, Barrett Manufacturing Company, and Mineralite Corporation, is interchange. These deliveries being made on designated interchange tracks on the P. B. & N. E. Railroad. The P. B. & N. E. Railroad Company delivers all cars, routing via our line and C. N. J. to designated interchange tracks in Reading Company Yard, from which tracks they are classified for further movement (1207).

All of the traffic moving via these two junction points is classified in Reading Company Yard, excepting that which comes via the Rutherford Gateway, which is classified at that point and reaches Bethlehem, Pa. in solid train, the road engines delivering to P. B. & N. E. the cars that route Saucon Junction, while delivery of cars routed South Junction are made by Reading Company switch engine (1208).

The distance from our classification yard to designated interchange track at Saucon Junction is 4050 feet, while the distance from our classification tracks to South Junction is 3328 feet, which cover the movement of loaded cars.

Empty cars for outbound loading by the various plants are delivered to P. B. & N. E. Railroad on order of their yardmaster.

About 92 per cent of these are delivered at Saucon Junction to a point about 2 miles from our classification yard, one-half of which distance is over Reading Company track, and one-half over P. B. & N. E. Railroad track. P. B. & N. E. Railroad is also reached by the Central Railroad of New Jersey and the Lehigh Valley Railroad (1208).

Upper Merion & Plymouth Railroad, 12.40 miles. Located at Conshohocken, Pa., Swedeland, Pa., and West Conshohocken.

It is a common carrier. We deliver and receive cars from this line at Mill Road, Pa., in the vicinity of Conshohocken, Pa., on two regularly designated interchange tracks, one of which is used for inbound cars and the other for outbound cars (1210).

458 At Swedeland, Pa., 90 per cent of the interchange is accomplished at the north end of the plant, on regularly designated interchange tracks owned by the Reading Company. The remaining traffic of 10 per cent is interchanged at West Conshohocken, Pa., at the south end on tracks regularly designated, which are partly owned by the Reading Company, and partly by the U. M. & P. Railroad, the traffic being principally coal for the Coopers Creek Chemical Company and Valley Forge Cement Company (1210).

The principal industries served by the U. M. & P. Railroad are the Alan Wood Company, Coopers Creek Chemical Company, Philadelphia Slag Company, Rainey Wood Coke Plant, Valley Forge Cement Company, and the Charles Warner Company. The amount of the switching reclaim is 1.99 days per car (1210).

That completes the industrial carriers, of which there are only three on the line of the Reading Company (1210).

Now taking the next classification, section 2–A, industries having a system of tracks where they perform their own service, receiving an allowance:

Berkshire Iron Works, now the Lavino Furnace Company, at Sheridan, Pa. We deliver and receive loaded and empty cars from this industry on regularly designated interchange tracks which are parallel to our main tracks. Westbound cars are placed on such interchange tracks as set off by road crews. Eastbound being similarly handled over running tracks. Demurrage Rule 3–E applies, and the average agreement is in effect.

The Central Iron & Steel Company, Harrisburg, Pa. Cars are delivered to and received from this industry on five designated interchange tracks. Westbound cars are set off at Rutherford, and Eastbound cars are set off at Harrisburg yard, five and two miles, respectively, from such interchange tracks, being moved by switch engines thereto. This plant is also served by the Pennsylvania Railroad. Demurrage Rule 3–E applies, and the average agreement is in effect (1211).

459 The Midvale Steel Company, Nicetown, Pa. Inbound cars delivered to this industry are placed on regularly designated interchange tracks on their property which lead from our Nicetown Yard tracks. Cars returning to Reading Company are placed on another regularly designated interchange track leading to tracks in Nicetown Yard (1211).

This industry is also served by the Pennsylvania Railroad. Demurrage Rule 3–E applies, and the average agreement is in effect (1211).

American Bridge Company, Pencoyd, Pa. That is known as the Pencoyd & Philadelphia Railroad. Cars are interchanged through extension of regularly designated interchange tracks in West Falls Yard, deliveries being effect on one designated track, and receipts on several designated tracks at the upper end of West Falls Yard. Another delivery is made at the lower end of Campbells Siding, known as the "spur" track, on which cars are placed for interchange by both the Reading Company and the P. & P. Railroad, the Pennsylvania Railroad also reaching the Pencoyd and Philadelphia Railroad. Inbound coal is placed on private tracks of the American Bridge Company by Reading Company switching power. No allowance. Demurrage rules 3–E and 3–D (on coal) apply, and the average agreement is in effect (1211–1212).

This completes the industries to which an allowance is made (1212).

The next list, where similar service is performed by the industries and no allowance is made, is classification 2–B, comprising: American Car & Foundry Co., Milton, Pa.; Baldwin Locomotive Works, Eddystone, Pa.; Harlan-Hollingsworth Corp., Bethlehem Steel Co., Wilmington, Del.; Wm. Cramp & Sons Ship & Engine Building Company, Cramp Brass & Iron Co., Philadelphia, Pa.; John T. Dyer Quarry Co., Howellville Quarries Co., Howellville, Pa.; J. K. Mosser, Newberry, Pa.; Reading Iron Company (Tube Works), Reading, Pa. (1212–1214).

E. & G. Brooke Iron Company, Birdsboro, Pa. Cars consigned to this plant are set out on Reading Company tracks immediately adjacent to the plant by road power and placed by Switching service of Reading Company. Outbound loads and empties are assembled by our switching power and brought out and placed on tracks adjacent to plant for movement by road power. Rule 3–D applies, and the average agreement is in effect (1215).

460 William Cramp Sons Ship & Engine Building Company, now I. P. Morris & De La Vergne, Inc., Philadelphia, Pa.: Cars destined to this company are placed by Reading Company switching power. Out-going loads and empties being removed therefrom in same manner. This plant is also served by the Pennsylvania Railroad. Rule 3–D applies, and the average agreement is in effect (1216).

Delaware River & Union Railroad. This is controlled by stock ownership by the Sun Oil Company. Marcus Hook, Pa.: Cars moving to and from this industry are placed by Reading Company switching service, which is alternated with the Pennsylvania Railroad, each line doing the work for a six month period, all costs and expenses incident thereto being assumed jointly by the two roads, on the basis of the number of cars loaded and empty that are handled inbound and outbound by each line with respect to the total number of cars that are so handled. Each road delivers cars on certain designated tracks within the plant, and spotting is performed therefrom by the line doing the switching during that particular period, there being practically a 24 hour switching service daily. Rule 3–D applies, and the average agreement is in effect (1216).

Donaldson, Iron Company, Emmaus, Pa. This plant is immediately adjacent to our eastbound track, the spotting service being performed by the Reading Company traveling switching engine at East Penn Junction, Pa. (1217). Traffic is also received by this plant from the National Slag Company, when the latter is in operation. Rule 3–D applies, and the average agreement is in effect.

Lehigh Coal and Navigation Company. The tracks are owned by the Lehigh & New England Railroad. Tuscarora, Pa. This is a colliery operation of the Lehigh Coal and Navigation Company, reached by the Maryd Branch, connecting with the Reading Company tracks at Maryd, which is 5.8 miles from Tamaqua, Pa., served by the Reading Company switching power. Rule 3-d applies. Also Rule 1–B–3. That is on coal. Straight demurrage is in effect there, on the inbound business (1217).

461 Lukens Iron and Steel Company, now the Lukens Steel Company, Coatesville, Pa. Cars are set off on Reading Company tracks immediately adjacent to the plant and removed therefrom and returned thereto by Reading Company switching power. In addition, this industry owns a narrow gauge interplant service which they operate themselves (1217).

Philadelphia & Reading Coal and Iron Company, Pottsville, Pa.: Rule 3–D applies, and the average agreement is in effect (1218).

Phoenix Iron Company, Phoenixville, Pa. Cars consigned to this industry are set off by main line road crews at Phoenixville station, which is about one-half mile from this plant, from which point they are placed by Reading Company switching service crews. Outgoing loaded and empty cars are similarly handled by our power. They are furnished service three times daily. This plant is also served by the Pennsylvania Railroad. Rule 3–D applies, and the average agreement is in effect (1218).

The Reading Iron Company, Danville, Pa. Cars destined to this company are set off at Danville Station Reading Company tracks by road crews and moved therefrom and placed on private siding of this plant by Reading Company service on an alternate weekly program with the Delaware, Lackawanna & Western Railroad.

Outgoing cars both loaded and empty are similarly handled. Rule 3-D applies, and the average agreement is in effect (1218–1219).

Reading Iron Company, Oley Street Mill, 9th Street Mill, and Keystone Furnace, Reading Pa. Oley Street Mill: Cars destined to this industry are dropped by road power at the Water Station about 1½ miles away from the plant, from which point they are moved by switching crews who give them a morning and afternoon service (1219).

9th Street Mill: Charcoal plant. Not working at present; cars being moved from and to Water Station about one-quarter mile distance by switching crews for assembling and movement by road power.

Keystone Furnace: Cars to and from this plant are handled by Reading Company switching service to the Water Station 1¼ miles away, where they are classified for road movement. Rule 3-D applies, and the average agreement is in effect.

Charles Warner Company, Cedar Hollow, Pa. This plant is located about 2½ miles from our main track at Cedar Hollow
462 on the Chester Valley Branch, Cedar Hollow being ten miles from division point, i. e., Bridgeport, Pa., cars being delivered to and received over connecting tracks owned by the Reading Company, service being performed by road crews. Rule 3-D applies, and the average agreement is in effect (1219).

463 That completes the list that was forwarded to the Reading Company by the Commission. In addition to this delivery, of course, we have the usual team track and side track deliveries on ordinary sidings (1215–1219).

The Reading serves a number of blast furnaces of steel industries. It has been the general practice of the Reading Railroad since beginning in serving these plants, the blast furnaces of steel industries, to place the car upon the industry's spurs at convenient places for loading and unloading without regard to the size of the track or the complexity of the industry as established by general usage. We have endeavored to apply that without discrimination and without preference as far as I know, but I wouldn't have any knowledge of why allowances have been made. I am testifying solely as to the operating situation. There are only a few steel industries now where we go in with our own power and do the spotting at convenient places as established by general usage. Those would be the Phoenix Co. and the Lukens Steel Co. Practically all the others are doing their own switching. We complete the service in only two cases and they get the complete rate and the complete service under the district rate, whatever it is. I do not have in mind in making my answer only the iron and steel plants. It is our obligation to the industries of all kinds along our line to place the car (p. 1221).

464 In classification 2-C, where the spotting service is performed by the Reading, I would say that our switch engine

which enters the plant to perform the service always does so at the direction of the industry at times and in accordance with the cars on hand for service. I think it would be very safe to say that in all cases there is a regular set-up program of operations between the plant people and our people at the station or at the yardmaster's office, having control over that situation, and it is worked out with the least possible delay or duplication of effort that is possible to arrange. We go in there and render the service. In most cases the engine goes in under regular schedule, in some cases at the call of the industry, when the industry is ready. In that case, we perform the service to meet the convenience of the industry (1223).

If we make delivery to the plant just outside the interchange track for further handling by that plant, that is the easiest operation. So far as the spotting of cars in the plant of the spotting cars for team track delivery is concerned, I don't know that there is much difference (1224).

Q. But from your experience you would say spotting within the plant at the industries is the greater service, takes up the most time—more difficult?

A. No; I said where we could deliver the cars in a group to an interchange track for further placement by the industry power, was the most economical service we could perform. To distinguish between ourselves, or our own team track, I said I could not distinguish between the two. The service was so similar that I couldn't tell the difference. It would depend on the local conditions, differing from place to place (1224).

Q. In connection with where you do the spotting service, and the matter of that spotting service being performed for the convenience of the industry: Now, do I understand it is your practice to determine the reasonable needs of that industry, and supply a service which meets those reasonable needs, taking into account the amount of traffic handled?

465 A. Absolutely.

Q. And if the industry should call upon you for other than reasonable service in that connection, would you be inclined to grant it?

A. No, sir (1226).

466 O. E. SCHULTZ was called as a witness, and having been duly sworn, testified as follows (Vol. 2, p. 1269):

DIRECT EXAMINATION

My official position is as General Freight Agent with the Monongahela Railroad. I have occupied that position since June 1, 1930. Prior to that I was employed by that same company in different traffic and transportation positions since October 1915.

I am qualified to testify as to transportation os well as traffic matters (1270–1271).

In addition to the more or less special cases which have just been pointed out to the Commission, other terminal cases seem to fall readily into five classes:

1. Terminal services performed by industrial common carriers whose allowances are made by the railroads out of the linehaul rate, and in this particular class the Monongahela Railway has no such industrial carriers connecting with its lines.

2. Services performed by the industry for which allowances are made, and we have no such arrangements as this on our line.

3. Services performed by the industry for which no allowances are made. Under this class we have seven industries, located as follows: Monessen Coal & Coke Company, Alicia, Pa.; Buckeye Coal Company, Nemacolin, Pa.; Weirton Coal Company, Isabella, Pa.; Peoples Natural Gas Company, Brave, Pa.; H. C. Frick Coke Company, Leckrone, Pa.; Domestic Coke Corporation, Fairmont, W. Va.; International Combustion Tar & Chemical Company, Fairmont, W. Va.

At the Domestic Coke Corporation, Fairmont, W. Va., all switching is done by that company with its own power. The Domestic Coke Corporation power also does the switching between our point of connection with their tracks and the plant of the International Combustion Tar & Chemical Company.

At all of these industries where the switching is done by the industry with its own power, demurrage is assessed in accordance with Section E of Rule 3 of the Demurrage Tariff.

The remaining two classes are:

467 4. Industries having a series of tracks, the railroad company performing all terminal services.

5. Services performed by the railroad company to ordinary industrial sidetracks (1273–1275).

The Domestic Coke Corporation and the International Combustion Tar & Chemical Company receive no allowances for the spotting service (1275).

Our line haul rates on carload freight include the placing of empty car for loading on public or private tracks and switching of the loaded car therefrom. Placement of the loaded car on public and private tracks and switching of empty car therefrom. Our line haul rates on less than carload freight include loading and unloading through the freight house (1276).

CROSS-EXAMINATION

With reference to these seven industries mentioned we pay no allowances—they do their own switching but we pay them no allowances. The industry usually determines whether it or the railroad will perform the service. If they (industry) have their power there and it is more convenient for them to do it and they are satisfied to do it, we have no objection to their doing it of course (1285).

We reach the chemical plant (International Combustion Tar & Chemical) through the Domestic Coke Corporation. The Coke Corporation handles the cars in order to get them to the chemical plant. No allowance is made to the Coke Corporation for performing that service so they are performing a service substantially for us to the chemical company for which they are not receiving compensation. There may be a corporate relation between these two companies, but I do not know of it (1288).

Our line haul rates are for through-delivery shipments at convenient loading and unloading points, at the particular industries which receive or ship out traffic over our line. Where an industry has elected to perform the switching service itself, at which points we make no allowance, in preference to having our power
468 come in and perform the service, that is something they have elected to do, and are really relieving our company of a certain amount of service in doing that work (1291).

Using the Domestic Coke Corporation works as an example, if we make delivery to that plant I think our obligation would be to place the car on one of their tracks where they would care to have it placed (1291).

469 There has been no complaint to our traffic department by shippers along the line of preferences and favoritism in regard to our terminal services (1290).

470 F. T. SLADDEN was called as a witness and, having been duly sworn, testified as follows (Vol. 2, p. 1294):

DIRECT EXAMINATION

I have held the position of general freight agent of Pittsburgh & Lake Erie Ry. Co. for about eight years, and have prepared a statement dealing with certain points mentioned in the Commission's notice. Our line-haul rates on carload freight include the placement of empty car for loading on public or private tracks, the switching of the loaded car from such tracks to our make-up yard, the switching of the loaded car from the break-up yard at destination to and including placement on public or private tracks at destination, and the switching of the empty car therefrom (1295).

Our line-haul rates on less than carload freight include loading and unloading through the freight house (1295).

Taking up the question of plant facility allowances, the service of effecting a required delivery of an inbound loaded car on an industrial private siding, or receiving an outbound loaded car therefrom, without additional charge over and above the line-haul rate, had been prior to April 1, 1914, and now is, the general practice of the trunk line carriers, ever since the advent of railroads (1306).

In the first paragraph of the syllabus in its decision in the Industrial Railways Case, I. C. C. Docket No. 4181, 29 I. C. C. 212, the Commission said:

"Upon the evidence and testimony adduced of record herein, it is held, That the service by line carriers in official classification territory beyond a reasonably convenient point of interchange, between their rails and the tracks of industries, is a shippers' service, a part of the industrial operations of the plant, and not a service of transportation; and that the performance of such services by the line carriers without charge in addition to the rate, and the allowances paid by them therefor to industries, or their plant railways, for performing the service for themselves, are unlawful rebates, in
471 fact and in effect, and give undue and unreasonable preferences and advantages to the industries so favored and work undue and unreasonable prejudice and disadvantage to shippers in the same line of business who do not receive any such allowances or the benefit of any such services."

Pursuant to the Commission's decision in the aforementioned case, all terminal allowances paid by the Pittsburgh & Lake Erie Railroad to industrial railroads and industries performing their own terminal switching service were cancelled effective April 1, 1914 (1306).

Allowances were paid to the following companies by the Pittsburgh & Lake Erie Railroad prior to that date, as follows:

Aliquippa & Southern Railroad (Woodlawn), Aliquippa, Pa.

Allegheny & South Side R. R., Oliver Iron & Steel Co., Pittsburgh, Pa.

McKeesport Connecting Railroad, McKeesport, Pa.

Mercer Valley R. R., Farrell, Pa.

Monongahela Connecting R. R., Pittsburgh, Pa.

National Malleable Castings Co., Sharon, Pa.

New Haven & Dunbar R. R., Dunbar, Pa.

Pittsburgh & Ohio Valley Ry., Neville Island, Pa.

St. Clair Terminal R. R., Wylie (Clairton), Pa.

Scottdale Connecting R. R., Scottdale, Pa.

Sharon Steel Hoop Co., Sharon, Pa.

South Shore R. R., Pittsburgh, Pa.

Union Railroad Company, Pittsburgh District.

Additional allowances named were paid following the restoration of allowances to the Monongahela Connecting R. R. and Union R. R. pursuant to a cost study made by accounting and operating officials representing interested main line roads in various districts, effective May 8, 1916 (1307–1309).

472 Following the restoration of the terminal allowances to the Monongahela Connecting R. R. and the Union R. R., and pursuant to a cost study made by accounting and operating officials representing interested main line roads in various districts, the following additional allowances were published effective May 8th, 1916 (1309):

Mercer Valley R. R., Farrell, Pa., 3 cents per ton.

National Malleable Castings Co., Sharon, Pa., actual cost but not exceeding 4.63 cents per ton.

Stewart Iron Co., Sharon, Pa., actual cost but not exceeding 1.81 cents per ton.

Sharon Terminal Ry., Sharon, Pa., actual cost but not exceeding 2.08 cents per ton.

Aliquippa & Southern R. R., Woodlawn (now Aliquippa), Pa., 4.33 cents per ton.

Pittsburgh, Allegheny & McKees Rocks R. R., McKees Rocks, Pa., 4.27 per ton.

St. Clair Terminal R. R., Wylie (Clairton), Pa., 4.05 cents per ton.

McKeesport Connecting R. R., McKeesport, Pa., 4.29 cents per ton.

St. Clair Terminal R. R., allowance reduced to 2.72 cents per ton.

Pittsburgh, Allegheny & McKees Rocks R. R., allowance was amended to provide that 50 cents per car on new and 25 cents per car on repaired cars would be allowed.

Carnegie Steel Co., Sharon, Pa., $1.46 per car.

South Shore R. R., Pittsburgh, Pa., $1.68 per car.

Carnegie Steel Co. (Schoen Works), McKees Rocks, Pa., 66 cents per car.

National Tube Co. (Ellwood Works), Ellwood City, Pa., 4.3 cents per ton.

During the interim between April 1, 1914, when all terminal allowances were cancelled, and the date they were reinstated on a different basis, reparation was paid the industrial common carrier railroads, plant facility railroads or the industries, on basis of the re-established allowances (1310).

473 The present terminal allowances paid by the Pittsburgh & Lake Erie Railroad, classified as to Common Carrier Railroads and Plant Facility Railroads, will be dealth with individually, first, the Common Carrier Railroads, of which there are 6, and then, the Plant Facility Railroads, of which there are 14 (1310).

The Aliquippa & Southern Railroad is a common carrier railroad, having been so found by the Interstate Commerce Commission in its decision in the case of the Jones & Laughlin Steel Co., I. C. C. Docket No. 11134, 60 I. C. C. 325, decided January 13, 1921 (1310).

The Aliquippa & Southern Railroad connects and interchanges with the Pittsburgh & Lake Erie Railroad at Aliquippa, Pa. (1311).

The Aliquippa & Southern Railroad performs switching service between the Pittsburgh & Lake Erie Railroad and the blast furnaces and steel mills of the Jones & Laughlin Steel Corporation and other industries located on and served by the Aliquippa and Southern Railroad (1311).

Prior to April 6, 1921, the terminal allowance paid the Aliquippa & Southern Railroad was on a plant facility basis, the measure of the allowance being 4.33 cents per ton.

Effective April 6, 1921, pursuant to the decision of the Commission in I. C. C. Docket 11134, the allowance was readjusted on an industrial common carrier basis, the measure of the allowance being 10 cents per ton, which is the allowance paid at the present time, as per P. & L. E. Tariff, I. C. C. 2904 (27) (1311).

The present allowance of 10 cents per ton is a compromise figure determined as a result of negotiations entered into between the Aliquippa & Southern Railroad and the Jones & Laughlin Steel Corporation on the one hand and the Pittsburgh and Lake Erie Railroad on the other. At the hearing in this case, aforementioned, a cost study was introduced into the record by the Aliquippa & Southern Railroad, which produced a figure of 9.4 cents per ton. Subsequent to the hearing a further study made by the Aliquippa & Southern Railroad produced a figure of 12.08 cents per ton. A study made by the trunk line carriers a number of years ago, as referred to in the Commission's decision, produced a figure of 6.97 cents per ton to which the Aliquippa & Southern would then have been
474 entitled on a common carrier basis. This figure increased 25 per cent and 40 per cent produced a factor of 12.19 cents per ton. A decrease of 10 per cent brought that figure down to 10.95 cents per ton (1311).

The tariff provides for the non-payment of the terminal allowances on the following:

(1) Freight on which the rate of the P. & L. E. R. R. at Aliquippa, or, from or to Aliquippa, as the case may be, is 20 cents per ton, or less.

(2) Freight on which the P. & L. E. R. R. receives its switching rate as named in the tariff specified.

(3) Cars of ashes, slag and other refuse materials that are delivered to the P. & L. E. R. R. for wasting under the tariff specified (1312).

In connection with all of these industrial common carriers which I am referring to, the allowances accorded to the industrial common carrier includes a final spotting within the plant of the various industries. The allowance includes service from and to the point of interchange with connecting carriers. The allowance which the Commission found these lines were entitled to includes spotting with final delivery within the plant with the exception of ex-lake ore (1313).

Q. Does that allowance which the Commission found these lines were entitled to include spotting for final delivery within the plant?

A. Yes. The only exception is ex-lake iron ore.

Q. Would that be true with respect to all these industrial common carriers? That is, the allowance accorded includes the spotting within the plant?

A. It would; yes.

Q. And not merely to some convenient point within the plant, and the plant beyond that?

A. The only exception is on ex-lake iron ore.

Mr. KEELER. By "final spotting" you mean first spotting?

Director BARTEL. I mean spotting at point of unloading.

475 The Monongahela Connecting Railroad is a common carrier railroad, having been so found by the Interstate Commerce Commission in its decision in the case of the Jones & Laugh-

lin Steel Co., I. C. C. Docket No. 8406, 53 I. C. C. 556, decided July 5, 1919 (1314).

The Monongahela Connecting Railroad connects and interchanges with the Pittsburgh & Lake Erie Railroad, the Baltimore & Ohio Railroad and the Pennsylvania Railroad at Pittsburgh, Pa. (1314).

The Monongahela Connecting Railroad performs switching service between the Pittsburgh & Lake Erie Railroad, the Baltimore and Ohio Railroad and the Pennsylvania Railroad, and the blast furnaces and steel mills of the Jones & Laughlin Steel Corporation and other industries located on and served by the Monongahela Connecting Railroad (1314).

The original allowance of 10 cents per ton was determined to be representative of the approximate actual cost of the service to the Monongahela Connecting Railroad, and was established effective April 14, 1915, in accordance with an agreement with the Monongahela Connecting Railroad Company under the permission granted by the Interstate Commerce Commission on November 2, 1914, in Case No. 4181, 32 I. C. C. 129, commonly known as the Industrial Railway Case. The present allowances of 16 cents and 15 cents per ton are published in P. & L. E. R. R. Tariff I. C. C. 2904, Index 27 (1315).

The Pittsburgh, Allegheny & McKees Rocks Railroad is a common carrier railroad, having been so found by the Interstate Commerce Commission in its decision in the case of Pittsburgh, Allegheny & McKees Rocks Railroad Company, I. C. C. Docket No. 10393, 57 I. C. C. 1, decided February 13, 1920 (1316).

The Pittsburgh, Allegheny & McKees Rocks Railroad connects and interchanges with the Pittsburgh & Lake Erie Railroad and the Pittsburgh, Chartiers & Youghiogheny Railway at McKees Rocks, Pa. (1316).

The Pittsburgh, Allegheny & McKees Rocks Railroad performs switching service between the Pittsburgh & Lake Erie Railroad and
476 the Pittsburgh, Chartiers & Youghiogheny Railway, and the railway car plants of the Pressed Steel Car Company and other industries located on and served by the Pittsburgh, Allegheny and McKees Rocks Railroad (1316).

The present allowance of 10 cents per ton was determined as the result of a cost study conducted by the trunk line carriers in conjunction with the Pittsburgh, Allegheny & McKees Rocks Railroad, in May, 1918, as submitted in the record in the aforementioned case, increased 25% and 40% and decreased 10% (1316).

The Pittsburgh & Ohio Valley Railway is a common carrier railroad, having been so found by the Interstate Commerce Commission in its decision in the case of the Carnegie Steel Company, I. C. C. Docket No. 11275, 80 I. C. C. 269, decided May 31, 1923, and, upon rehearing, June 2, 1925 (1317).

The Pittsburgh & Ohio Valley Railway connects and interchanges with the Pittsburgh & Lake Erie Railroad and the Pittsburgh,

Chartiers & Youghiogheny Railway at Neville Island, Pa. (1317).

The Pittsburgh & Ohio Valley Railway performs switching services between the Pittsburgh & Lake Erie Railroad and the Pittsburgh, Chartiers & Youghiogheny Railway, and the blast furnace and coke works of the Davision Coke & Iron Company and other industries located on and served by the Pittsburgh & Ohio Valley Railway (1317).

Prior to October 15, 1925, and subsequent to April 1, 1914, there was no terminal allowance paid to the Pittsburgh & Ohio Valley Railway (1317).

Effective October 15, 1925, pursuant to the decision of the Commission in I. C. C. Docket 11275, an allowance of 10 cents per ton was published in P. & L. E. Switching Tariff I. C. C. No. 2739, which is the allowance paid by the P. & L. E. at the present time, as per P. & L. E. Tariff I. C. C. 2904, Index 27, Supplement 5 (1317),

The present allowance of 10 cents per ton was determined to be the actual cost of the service to the Pittsburgh & Ohio Valley Railway, as developed by a cost study conducted by the trunk line carriers in October 1923, under the industrial common carrier formula (1317).

477 Allowances are granted to the following plant facilities.

Beaver Connecting Railroad, Carnegie Steel (Schoen plant), Etna & Montrose Railroad, Mercer Valley Railroad, Monessen Southwestern Railway (Pittsburgh Steel Co.), National Malleable & Steel Castings Company, National Tube Co., Ellwood Works, Oliver Iron & Steel Company (Allegheny & South Side Railroad), Page Steel & Wire Company, Pittsburgh & Allegheny River Railroad, Sharon Steel Hoop Company, Spang, Chalfant & Co., Inc., Struthers Iron & Steel Company, The Youngstown & Northern Railroad.

We wouldn't have a switching service to the Spang, Chalfant Company at Etna because we don't reach that plant direct. It is served by the B. & O. and Pennsylvania. In such case we give an allowance merely on line haul traffic and not on switching traffic. The industries which we reach through some other railroad we can not physically reach with our own rails by trackage rights or otherwise.

Q. What obligation is there on your part, therefore, to serve an industry under your line-haul rate which you don't reach with your own rails?

A. If we didn't do it we wouldn't get any of their business.

Q. But what obligation is there under your line-haul rate? What is your obligation to reach out on somebody else's railroad and serve an industry on your line-haul rate?

A. The line-haul rate, as I understand it, contemplates the delivery of the car to th eplant, or the taking of the car from the plant.

478 Q. You mean, beyond the rails of the P. & L. E., or are you confining the answer to the P. & L. E. rails?

A. No; an industry on some other railroad—that we route by some other railroad (1333).

We had to publish these tariffs ourselves because the switching lines did not pay the terminal allowance out of their switching rate. Therefore to continue in business with that concern we had to make the allowance ourselves (1334).

The tariff providing for the allowance shows that the allowance will not be made on switching traffic (1335).

The tariff is wide open and makes no exception as to how far it applies, whether interchange with the industry or placement on the track of the industry. But these rates, while they are wide open in that connection, a tariff which provides for a specific allowance to the industry makes specific provision that that allowance will not be paid by the Pittsburgh & Lake Erie in its switching rates. In one case we perform less service than another at the same rate. In one case we place the car on an industrial track and in another case we go in and spot the car and our interchange charge is the same (1336).

These allowances are all determined by committees. The Central Freight Association has a terminal allowance committee and have an accounting committee on that terminal allowance committee. It is that committee that conducts the investigation (1337).

There is a regular formula employed for the purpose of ascertaining the costs in making these allowances. I can furnish copy of that formula (1339).

479 (A document which contains the action of the Central Freight Association, Trunk Line Association, and New England Freight Association, with reference to procedure for consideration of applications for allowances and rules for determination of allowances to industries for plant facility operation, which became effective July 18, 1929, and, "as I understand it", embraces the formula prescribed by the Commission in the Pullman case, was received in evidence and marked "Carriers' Exhibit No. 106, Witness Sladden") (1340).

I never personally had anything to do with the development of these terminal allowances. They have been developed by committees in charge of that work for the association. The formula which has been introduced into the record is employed in getting at the cost to the industry. I could not attempt to explain the formula. It would have to be read in order to develop its meaning. Generally the allowance contemplates the placement of a car, the first placement of the car, on the industry's track—the first placement where they ask to have it put originally. If they (the industry) want a movement from where they first asked to have it placed that would be subject to the switching rate. (Rules 7 and 8 of the formula were read by Mr. Healy) (1343).

Rule 7: The plant shall receive from the Railroad on designated interchange tracks, loaded or empty cars for placement at the plant and shall deliver loaded or empty cars from the plant on designated interchange tracks.

Rule 8: The service between point of interchange and point of loading or unloading, as the case may be, shall be charged to the

Railroad, provided it is a progressive movement to point of placement or delivery, performed without plant interruption or interference. If plant interruption or interference is encountered, the service after such interruption or interference shall be charged to the plant.

Our published rates under the customary application of them include the service of traffic from the point of loading on industrial tracks to the point of unloading on industrial
480 tracks whether on our own line or on the line of connection, at either the loading or unloading point. We generally absorb switching charges under such circumstances where the connecting line will switch for us (1344).

The circular which has been received as Exhibit No. 106, is nothing new. This is just the practice obtaining in the different associations brought up to date and corrected. I don't think there have been any essential changes. I am not familiar with the Commission's decision of the Chicago West Pullman & Southern Railroad case, Volume 37 of the Commission's reports.

Mr. BURCHMORE. I ask the Commissioners to take notice that that report, laying down the formula for ascertaining costs, gives two distinct formulae, one for the plant facilities and a different formula for common carrier railroads (1349).

The total freight rate as published covers road haul movement by the publishing line, plus absorption of this connecting line switching, plus whatever has to be paid to the industry, to accomplish placement for unloading (1352).

As a freight traffic man of experience I can see no reason for making different charges on freight which goes to a delivery on the P. & L. E. on the one hand and to an industry four miles off the P. & L. E. on the other hand; and can see no reason for any suggestion to break that rate up and split it in eighth or quarter or half mile differences for hauls beyond the trunk line rates. None of our rates as now constructed contemplate an addition for any such short service beyond the trunk line right of way.

I think there are seven out of the 14 allowances we make that are subject to a maximum allowance—actual cost subject to a maximum allowance. We have 14 plant facility allowance tariffs. The
481 amount of the allowance in no case was more than the cost to the railroad. These allowances at the present time are computed on the 1915–16 unit costs. It is perhaps true that every single plant facility allowance is less than the railroad could perform the same work for themselves (1354).

We have not felt that there was enough revenue involved out of which to pay these allowances when the traffic was handled in switch movement. Therefore our tariffs are restricted so that the allowance will not be made when the traffic is handled on a switching rate. Now, if where we are an intermediate line between connecting trunk line carrier and the plant facility, or a common carrier railroad, the connecting trunk line carrier wants to get any

business from this plant that gets an allowance, they have got to provide for the allowance in their own tariff, just the same as we have done in several instances where the plant facility railroad is off our line (1356).

Q. * * * let us assume an instance where the P. & L. E. is a switching carrier, are there any instances where an industrial plant, any of these that we have been talking about, will let your switch engine into the plant yard to do the spotting?

A. You mean the industries that have these plant facility railroads?

Q. Yes.

A. I don't think they would let us in. It would interfere with their operation.

Q. Are there any instances where they do let you in?

A. I don't know of any.

It is true that if our connecting line pays an allowance to the industry for completing the service, then the switching charge will take it to the interchange track. If they do not make an allowance, then it will take it beyond the interchange track.

What I am trying to make clear is that we have not seen our way clear to pay allowances out of switch traffic. Our switching tariff will take the car to the plant, if there is no allowance paid; if there is an allowance paid, it will not take it beyond the interchange track. We don't go on the plant facility railroad
482 because the plant would not be willing for our engine to go on their railroad because it would interfere with their operation. The industry railroad does it for less money than we can do it ourselves in some cases (1358).

We have on the P. & L. E. Railroad many hundreds of industries that have private sidetracks to and from which we switch the cars loaded with freight, and we have many such instances in the Pittsburgh district (1360).

Q. You charge the same rate to and from Pittsburgh in the case of an industry in the extreme end of the district involving a very elaborate amount of switching service on your part as you perform for the nearest industry in the district for the minimum switching service, do you not?

A. Yes.

Q. When I speak of switching service, I mean through the point where a man takes the goods out of the car. That is correct, is it not?

A. That is correct.

Q. There are many industries owned by great big concerns like Carnegie Steel Company where you perform the switching, do you not?

A. Yes (1360).

I know of only one industry which performs its own switching and receives no allowance, the Mesta Machine Company, at Homestead (1361).

Q. Who determines for your company whether or not an allowance will be paid to such a company, or to any industry which performs its own spotting service?

A. An application for the terminal allowance would go to the Central Freight Association, in our case, and be considered by what they call the Terminal Allowance Committee, and if they decided that the industry was entitled to an allowance they would have an investigation made and a cost study conducted by the committees in charge of that work.

Q. Do you know whether or not the single industry which you mention has ever made such an application?

A. Not to my knowledge.

483 If the line haul carrier observes the switching line switching charge, which contemplates delivery to the plant, and then makes allowance to the plant for the completing part of the service, for which they have already paid the railroad, there is a double payment by the line-haul carrier if you want to put it that way. That does not affect the revenue of the carriers as a whole in this particular group. It affects the revenue of the particular line haul carrier (1364).

Our disposition has always been to give our industries an outlet for their traffic. We have never attempted to sew them up so they could not do business with any railroad they wanted to (1366).

We make no allowance for the spotting service on ex-lake iron ore in the case of plant facility railroads; but in the case of common carrier railroads, they get the allowance in everything, including ex-lake iron ore (1366).

484 J. L. O'TOOLE, Assistant to General Manager, Pittsburgh and Lake Erie Railroad, Pittsburgh, Pa., was called in as a witness and having been duly sworn testified as follows (Vol. 2, p. 1367):

DIRECT EXAMINATION

I am Assistant to the General Manager, Pittsburgh and Lake Erie Railroad. My testimony will not only cover the Pittsburgh and Lake Erie Railroad, but the Lake Erie and Eastern Railroad. The Lake Erie and Eastern Railroad is owned jointly by the Pittsburgh and Lake Erie Railroad and the Mahoning Coal Railroad, the latter being operated by the New York Central under the jurisdiction and management of the Pittsburgh and Lake Erie.

There are 11 industries located on the Lake Erie and Eastern Railroad having one to four sidings. The Republic Iron & Steel Company, David Joseph Company, Carnegie Steel Company, Brier Hill Steel Company, Youngstown Sheet & Tube Company, all located at Youngstown, Ohio, on the Lake Erie and Eastern Railroad, have five or more sidings and are in the course of the instant hearing referred to as having a system of tracks.

On the Pittsburgh and Lake Erie Division of the Pittsburgh and Lake Erie Railroad, there are 135 industries having from one to

four sidings. Industries having five or more tracks are: Republic Iron Works, Pittsburgh; Oliver Iron & Steel Company, A. M. Byers & Company, Dilworth-Porter Company, Pittsburgh Terminal Warehouse, Lockhart Iron & Steel Company, McKees Rocks; Schoen Steel Wheel Company, McKees Rocks, Pa.; Lewis Foundry, Groveton; Duquesne Steel Foundry, Kendall; Clydesdale Stone Company, Ellwood Junction; American Sheet & Tin Plate Company, Shenango Plant, New Castle, Pa.; Crescent Cement Company, Wampum; Carnegie Steel Company, New Castle; Pennsylvania & Ohio Electric Company, Lowellsville; American Sheet & Tin Plate Company, New Castle; Struthers Furnace, Struthers; Youngstown Sheet & Tube Company, Youngstown; Sharon Steel Hoop Company, Bentley; St. Joseph Lead Company, Monaca; Lake Erie Limestone Company, Shaw Junction; Johnson Limestone Company, Hillsville; Carbon Limestone Company, Hillsville; Colonial Steel Company, Colona.

485

There are 48 industries on the Monongahela Division having one to four sidings. Industries having five or more sidings are the Pittsburgh Steel Foundry, Glassport; Copper Weld Steel Company, Glassport; Page Woven Wire Fence Company, Monessen, which is a plant facility; American Sheet & Tin Plate Company, Monessen; Pittsburgh Steel Company, Monessen, served by a plant facility railroad; and the General Chemical Company, at Newell.

There are 53 industries on the Youghiogheny Division having one to four sidings. Industries having five or more tracks are Mesta Machine Company, West Homestead; McClintic-Marshall Company, Rankin; McKeesport Tin plate Company, Lynch; Pittsburgh Wood Preserving Company, Broadford.

The Mesta Machine Company at Homestead is the only industry I know of having a so-called system of tracks which performs its own spotting service without receiving an allowance therefor. The reason it does this is because of the severe curvature in the plant. The railroads do not have locomotives which can negotiate the curves in this plant.

486

At all industries with that exception, railroad power performs all the terminal spotting service to the industries named (pp. 1367–1370).

I will illustrate the instances in which we do spotting services at these large plants. We take the car after arrival in the road train to be switched out by yard power and then move it from that set-out point to the industrial tracks and place it at the point of unloading.

I mean by that, the set-out point where the road crew sets out or drops the cars in road service from the break-up yards and we then take it to the industrial tracks and spot them direct. In a great number of instances the engine that goes from the break-up yard actually spots. In the larger industrial plants the engine moves from the break-up point to a system of tracks commonly known as interchange tracks and from those interchange tracks railroad power

commonly designated as joint power, one road's power and crews, performing all service for itself and other lines that reach that industry, perform the service from interchange tracks to spotting points in the plant. The spot is generally under control of plant representatives. In other words, plant representatives control the switching crew insofar as movement of the cars from the so-called interchange tracks just within or just outside the plant to a spot in the plant. It is true that we first take our cars from the break-up yard, spot them on an interchange track just within or just outside the plant enclosure. That is, by one switching crew within the plant and take the cars from that particular interchange track and spot them within the plant under the plant's direction. At the large industrial plants that is exactly the way it is handled (p. 1371).

We do not spot the cars within the plant instead of dropping
487 them on the interchange tracks because most of the big plants are laid out and have an orderly procedure. Everything moves with a so-called flow of traffic and the placement at interchange tracks is on the request of the plant people themselves and they control the movement as and when they want the cars moved from that point to the unloading point. I would not regard that as a second movement from the interchange tracks just inside or outside the plants to the final spot. It might be true that it is necessary for the crew that is switching the plant to drill out cars which might be on that particular track in order to spot them at the request of the industry.

At the Campbell works of the Youngstown Sheet and Tube Company, as we have at the present time, I think an average of 10 crews per day continuously. That is 10 crews for 24-hour periods (p. 1372).

I regard our locomotive expense at that point, not taking in any capital investment in the locomotives or depreciation, as running about $7.50 per hour, which would be about $60.00 per day for the 10 crews, which would be about $600. There is no extra charge published for the second service beyond the interchange track on the inbound load. Another plant where we have this service where we place cars in the break-up yard and put them on the interchange track and then at the convenience of the plant have crews assigned so that the plant can order cars in at its convenience is the Ohio Works of the Carnegie Steel Co. on the Lake Erie and Eastern Railroad. We have approximately the same number as at the Youngstown Sheet and Tube Company and the same engine expense is present. The items of expense taken into account are locomotive repairs, fuel for locomotives, water, lubricants, other supplies, engine-house expenses, and the wages of the engine and train crew. I said $7.50, it is roughly about $7.21. That does not take into account the terminal investment (p. 1373).

488 In the Youngstown district, generally speaking, these interchange tracks are on the property of the industry. In other

words, we take the cars from the break-up yard and place them on interchange tracks within the industries which they will later request to be switched from the interchange track under our power under control of the plant at the plant's convenience.

Spotting cars from the interchange track is an operation that the carrier has, so the work can be performed more economically and efficiently than if the crew took the cars from the break-up yards and tried to spot the cars around the plant. As a matter of fact, before the joint pulling operations were entered into, each line reaching that plant made an effort with its own power and crews to do all of the work from the outside yards to the point of spotting within the plant. It is an operation arranged so that the work can be done more efficiently and economically for the railroads (1374). At most plants, before the arrangement was put into effect, each railroad with their own engines were trying to spot the cars at their own plants.

As to what is meant by joint pulling, I mean taking the Campbell Works of the Youngstown Sheet and Tube Company, which is a plant reached by the P. & L. E. and the B. & O. and Pennsylvania. Under an operating agreement, the Pennsylvania and B. & O. engage the P. & L. E. as its agent in performing all service inside the plants. At other large plants, possibly the Pennsylvania do the work; others the B. & O., others the Erie.

Q. Would it be possible for you, on those roads to enter the plant without interfering with plant operation?

A. There would always be interference.

489 In performing the service for the other roads under this pulling arrangement we do not rotate from time to time. That is not considered practicable. That would be against efficiency, and again the pulling takes into consideration the location of carriers' engine terminals and the readiness of getting locomotives to and from the engine house. We do all the switching for other roads. The total expenses of those crews are divided on a loaded car basis (1375).

Q. These plants where you maintain crews for service within the plant—are those all steel industries?

A. We do not know of any other industry of any magnitude which would require a proposition of that kind. In some cases our power goes in on the tracks and is maintained at the plant for the purpose of doing the spotting at the loading or unloading point. In other cases the industry itself performs that service and our Company makes an allowance.

As I understand it, if the plant feels it is in position to perform all the service, they would make application for plant facility allowance. The matter is considered and committees are appointed to investigate and they will determine which of the two can perform it the cheapest, that is, the plant or the railroad. Then if it is found it is desirable to have the plant perform it, and our cost is less than theirs, we only pay them our costs (1376). The local management would have the last say in the matter.

In reference to these particular plants, where the allowance is made, it is more economical to have the industry perform the service than to maintain our own crews and our own locomotives at these plants. I think that it is largely true, based on the studies made in each instance. At the places where we perform our own serv-
490 ices, none of the plants have asked us to let them perform it for us, so we haven't reached that test yet—whether the plant could perform it cheaper than we could.

Our largest operation where we maintain locomotives at the plant is the Campbell Works of the Youngstown Sheet and Tube Co. I said there was about 10 crews a day. That involves, I would say about seven engines. These engines are consigned to work inside the plant, but they are not kept inside the plant all the time. The unit engine is constantly changed. An engine must come back to the round house for inspection after a certain number of hours. That is, our repairs are made outside the industrial plant. Right at the present time, the largest number of engines that we have engaged at any one plant is 7, at the Youngstown Sheet & Tube Company's plant located at East Youngstown. These seven engines, and crews operate under the direction of the industrial plant's superintendent. He furnishes them the switching list by which he is dragging and placing cars and billing them out. The plant superintendent is performing service for us when he is directing those crews. He is not carried on our pay roll (1378).

From the break-up yard to an ordinary spur, in my opinion, is just about the same character of service as the switching movement from a break-up yard to a public team track (1379).

In comparing services I have mentioned, to see which is the greater or which is the more simple—which is the more expensive and which is the less expensive—generally speaking, all moves are pretty much alike as I see it. You can't compare the service at a big industrial plant with a team track or an industry that has only one spur (1380).

491 Now our Company has no investment in any of these tracks which are owned by industrial plants. The switching cost I have mentioned is the cost of operating a switch engine one hour; it doesn't make any difference where it switches. That is the cost of operating a switch engine one hour (1361). The way I look at your picture as you presented it is this—suppose, now, for the sake of argument, all these industries would tell the railroads that they are not to deliver a car until they specifically order it in. I doubt if there is a railroad in the country that has got enough tracks to take care of the load. Up in the Hahoning Valley, I imagine they would have to double-deck. I don't know where they would get the real estate. If the industry asked that nothing be delivered until they specifically ordered it, we would be in a bad way for track room (1382).

The P. & L. E. hauls a great many cars of freight into Youngstown every day, perhaps a thousand cars. As these cars come into

Youngstown over the P. & L. E., trains are not made up of cars for a particular industry there, all by themselves in one part of the train. If a car of lumber comes in over our line consigned to a lumber yard, there is no physical reason why a yard engine could not take that car right out of the break-up yard and move it over directly to the private side-track. It is not done that way (1405).

The cars are classified upon arrival in the arrival yard with respect to destination of the cars. There might be two or three points up in Youngstown that would be billed for the N. K. yards, or it might be for the Lake Erie & Eastern Railroad, and an engine to the N. K. to move the cars to that point, or engine going to Lake Erie and Lansing would move the cars to that point. This car of lumber would be handled and we would not make any special movement of
492 that from our break-up yards and carry it clear back to the track on which they unload lumber, and place it there, but it is not done that way. We would handle that car just like we handle the car for the private side-track for the lumber company. It would be classified for delivery to the Campbell Works, just the same as lumber in Youngstown would be classified for movement in the N. K. yards. Generally speaking, an industry that has three or four side-tracks have tracks assigned for certain purposes and the industries usually require the railroad to place the lumber at one point, the lime at another point, and so forth.

The Pittsburgh and Lake Erie is selling transportation service and try to give service (1406). They want to put the lumber where the consignee asks us and we do not see that it would save any money if we did it the other way. We have public team tracks at Youngstown, right in the down-town section, where the real estate is valuable. We do not go from the break-up yard directly to the team track, and then go back and get another car. We have another method as I have already described. I can't give you any idea of how many cars they would load on a team track for all concerned at Youngstown. I would not think they would load as much as one-tenth of our cars (1407).

As far as our operating service as carrier is concerned in Youngstown, I cannot see any essential difference between this plant, known as the Campbell Works, on the one hand, and the situation of a dozen different consignees having adjacent places of business, each having its own tracks on which carload freight is originated or delivered. If the Campbell Works were to go out of business, and the plant sold to a dozen different purchasers, each of whom operated a separate part of the tracks, that is, the volume of the Campbell Works divided among several others, I would say it would add to our cost in service.

493 The definition given by the Commission in 34 I. C. C. is as follows:

"The line-haul rate covers the customary movement of cars from industrial tracks incident to the receipt and delivery of carload freights at convenient points on this track, for loading and unload-

ing, without regard to the size or obligation of the industry and the points at which the cars are to be placed by the carrier for that purpose without additional charge, was to be determined by general usage.'

This correctly states the practice in my experience.

There are some services for which we are suppose to be given an extra charge, and we try to keep track of those special services for which charges should be imposed (1408).

I was requested to make a list of the industries on our P. & L. E. Division as between those having one to four sidings, and those having 5 sidings or more. From an operating standpoint, I cannot see any essential difference between industries having one or four or less sidings, and on the other hand, four or more sidings. The four or less sidings do not constitute my definition, if I have any definition of a "simple siding." I cannot describe such a "simple siding." It is a term applied to railroad actual track operation. Loaded cars handled per engine hour is a fair indication of service rendered at any industry. I think that is the best test (1409).

I was a member of the Operating Committee that made studies on the P. & L. E. Railroad and we took three typical districts; the mill or furnace district, an intermediate, and the diversified industrial section, which would be composed largely of plants having four or less tracks, the business on that study, to my recollection, the diversified section was the highest cost per loaded car. I do not know that there is any change in the physical service performed by us at industries along our lines that were in existence in 1915 (1410).

494 Q. Then, to put it in one sentence, there has been no material change in the physical service rendered at any of those points on your line, with the exception of the furnace which has been torn down since the Commission decided the spotting case in 1915.

A. That is true (1410).

495 We have not far from our Pittsburgh passenger station a large station which we call "The Rocks" or McKees Rocks, that is the yard into which the trains go and uncouple, and cars are left there for distribution in this terminal district. Now, after a train has come into this yard, and it has in it some cars for delivery to our automobile platforms, it would be broken up by McKees Rocks yard engines. They would be hauled by yard engines from that point to tracks at Pittsburgh. I think automobiles would probably be set off on what we call River tracks or Tenth Street siding and later be delivered from that track to team tracks by the same or another locomotive according to circumstances, but usually another locomotive. What we call the River track corresponds to what we have spoken of heretofore as interchange track alongside an industry so we perform a second service from the River track to the unloading platform. In the same sense that the industry

performs a second service from the point of interchange to unloading.

We have also in Pittsburgh some team tracks, and they are on the same side of the Sixth Street bridge that we are on now, whereas our automobile platforms are on the other side. When we have cars for the team tracks our handling substantially is the same, in general, as I have just described for automobiles. On our team tracks we have possibly 8 or 9 tracks and on at least one of those tracks we have a pretty good capacity train for unloading. When we have a drag of cars for our team tracks near Smithfield Street, the switching locomotive starts out from McKees Rocks with that drag of cars. If all the cars on that track were for team track delivery, they would be picked up at the set-off point by the engine going into the team-track yard, and later on the same engine would spot it at the ground.

496 The first service which we would give is the set-off track, and the set-off tracks are in the neighborhood of Eleventh Street. From there we have a third service into the tracks of the team track yard. In order to classify, that has to be handled under the train, and we have a fourth service, if you are going to divide service on that basis. When a car is placed in a team track, it is spotted so that a consignee can drive up and unload the goods from the car, but it is on the point where the consignee could go with his truck on roadways provided by us and unload the car.

At our team-track yard, we have still a third—at least a third place of delivery other than private sidings at this neighborhood, namely, our terminal warehouse. These four places of delivery, the automobile platforms, public team tracks, terminal warehouse, all are property of the P. & L. E. Railroad. From a standpoint of service, I would say that they roughly correspond with the different localities in an industry, as to what has been referred to as a complex system of plant tracks. I can see no essential difference from the standpoint of operation (1413).

At the Mesta Machine Company, if that company were able to straighten out its tracks sufficiently to permit our train to enter, I would say that we have as much service as at the other plants on our line. It is my understanding that is where industrial disability relieves us in our obligation to perform full service (1414).

Speaking of the iron ore rate, I learn for the first time that the service of the railroad ended at a reasonable point of interchange; before the Commission's decision we used to perform the full service, but after the Commission's decision we no longer do. When you speak of a flat service, I understand it to mean the placement

497 of an unloaded car for loading by a consignee or placing of empties, for which an additional freight rate is paid. Since the Commission split up the iron ore charge and provided a separate charge for spotting, our road has done iron ore spotting at the two

Carnegie Steel Company plants, namely, New Castle, and Sharon Steel Hoop, at Struthers, or Lowellville and have collected something by way of spotting charges. With those three exceptions, all the other industries spot their own iron ore. It is just that much off the total rate of net revenue in our pocket (1415).

In my answers referring to a second and third service—in some instances it is a fact that these are merely stages of continued service which we perform through onto the unloading point at an industry, or from the loading point at the industry. They are not separate services, as they are merely stages of continuous through service (1418).

The principal commodities handled by the P. & L. E. are coal, limestone, ore, and iron and steel products. These commodities load very heavy. Our coal is handled very generally by the Youngstown district in sold (sic solid) trainload lots. Sometimes we even have solid trainloads consigned to consignees in the Youngstown district. That cuts down classification that we have to do with that commodity. There is less work on a solid train than on a mixed train. It is a general practice in all large industrial districts to have, in addition to its primary classification or break-up or make-up yards, secondary yards from which spotting deliveries are made to team tracks or private sidings. That makes for economy of operation (1419).

498 In the case of these two industries, where we have full power and where the P. & L. E. does the work for the other carriers and ourselves, the secondary yards are furnished by the industry. If they do not furnish the secondary yards we would furnish them ourselves for convenience of operation if we could (1420).

At the Ohio Works and Campbell Works, in normal times our business would run between 14,000, and as high as 18,000 loaded cars per plant per month; you would have more work to handle that number of cars for one plant, from an operating standpoint, than to divide them up into numerous small plants, and as an operating man, I would say our terminal service would be much greater if you had to make up that number of cars that are now handled at two plants, at 50 or 100 yards, which would be much more expensive. We would have main line interference and everything else. We have plant superintendents at both these plants that direct the movement of crews. Somebody at the industry, large or small, tells the conductor what he wants done and where he wants the car placed (1423).

The cost per car at the Campbell Works and the Ohio Works would be relatively very low (1424).

499 R. M. Paisley, General Freight Agent, the Pittsburgh & West Virginia Railway Company, called as a witness, having been duly sworn, testified as follows (Vol. 2, p. 1440):

DIRECT EXAMINATION

I have been connected with the traffic department of the Pittsburgh & West Virginia Railway for 22 years. For the last 11 years as General Freight Agent.

I have filed with the Interstate Commerce Commission tariffs covering all terminal services and practices of the Pittsburgh & West Virginia Railway connected with the receipt and delivery of freight at each point named in our circular No. 194. I will describe such services and practices briefly. It is the practice of the Pittsburgh & West Virginia Railway to receive and deliver carload freight on team tracks for private sidings for the freight rate. Only one placement of carload freight is permitted for the freight rate and an additional charge is made for any additional switching after the first placement. Those charges are published (p. 1444). Except at the Pittsburgh freight station, which is located on a viaduct, consignors and consignees must load and unload carload freight on team tracks and private sidings (p. 1445).

The only allowances made to a plant directly served by the Pittsburgh & West Virginia Railway for plant facility service is an allowance made to the Pittsburgh Steel Company—Monessen Southwestern Railway at Monessen, Pa. Our connection with that railway was made about June 1st of this year, so the allowance has been in effect only a few months (p. 1447).

In connection with this question of absorbing switching charges which I have described, I would say that we absorb such charges "to get a carload of freight." The effect of absorbing those charges is to put us on a parity with the other railroads at their switching points (p. 1455).

On practically all tonnage that we originate or deliver in
500 Pittsburgh our line has a switching absorption to pay out (p. 1456).

501 SAMUEL HOUSE called as witness and having been duly sworn, testified as follows (Vol. 2, P. 1625):

DIRECT EXAMINATION

I am Freight Traffic Manager for the Baltimore and Ohio Railroad, and will testify with respect to the traffic situation at Baltimore, Washington, and Cumberland. There are no allowances paid at those three points by the Baltimore and Ohio to any industry. Our tariff rates on carloads there include placing empty cars for loading on public or private tracks, switching the loaded cars from such tracks to the break up switches and switching from the break up switches to and including placement on public or private tracks at destination and the switching of the empty car from there. Such rates include the use of derricks and cranes in loading or unloading heavy freight at various points along the lines where they are available (P. 1625).

I have observed the effect of truck competition throughout the territory that we are talking about and have noticed with increasing concern a shrinkage in our fertilizer tonnage out of Baltimore. Confining this truck movement to terminal service I have this in mind, if we do not send a car to the industry to take the carloads that they have for us, we are further hampered in our effort to hold the business from the truck when the truck will go right to their door and place it.

CROSS-EXAMINATION

I heard the testimony of our operating witness regarding the movement of structural steel in the plant of Barber & Ross Company, at Washington. We have another fabricating plant, the Carnegie plant at Baltimore, and the Detrich plant at Baltimore, and several others. The track is similar there to Barber & Ross.

502 No charge is made in addition to the through rate for taking the loaded car in and taking the empty out. I am not talking about through transit (1629–30).

My testimony included the statement that by a custom and practice in the application of our published freight rate they were interpreted as including this delivery at the locations where cars are loaded or unloaded on tracks of either the shipper or consignor. That applies throughout my jurisdiction and my testimony goes to that jurisdiction only. That has been the custom in practice for a long time, and I do not know of it ever being different (1631).

These tariffs we have cover our switching charges over our line generally and also our absorption of connecting line rates and our allowance for shippers' service. With regard to our delivery at our freight rate as published, first where we ourselves reach the industry, we perform a complete service without charging any addition to the freight rate between stations, as simple spotting. Where another line is involved, that is, the industries run by another trunk line, by a common carrier not a trunk line, or by a plant facility, different tariffs are set up as necessary to breach the gap. Now our published rate to Cumberland in local Baltimore and Ohio tariff will cover spotting of the car at the industry served by the Baltimore and Ohio tracks, but that same rate would not cover spotting of the car at an industry on Western Maryland tracks, unless, as happens to be the case, the absorption is authorized by tariff lawfully on file with the Commission. Our practice has been the same since 1915, and probably much longer than that, the general practice I have described (1645).

I am familiar with the switching tariffs, in a way, and un-

503 derstand that, taking for example, a switching charge from a connecting line going to an industry on our line that a switching charge would take a shipment to the customary place of spotting for delivery within a plant where the car is unloaded by the consignee (1657).

504 Q. To state it more accurately, put it in the converse, you do not in any case, on iron ore, make a separate and additional station-to-station rate for placing a car at the point of unloading?

A. That is right.

Q. Has your practice been since 1915, and probably much longer than that, the general practice you described?

A. Yes, sir.

Q. You have recently, or your line, put into effect a new basis of rates on manufactured iron and steel articles?

A. Yes, sir.

Q. The case in which that was described which was presented to the Commission—was the practice as you have described it in force on the lines of the carriers generally?

A. Yes, sir.

Q. It was in contemplation of that complete service that the carriers presented there another case in that iron and steel investigation; was it not?

A. Yes.

Q. And in your duties as traffic man, have you complied with the order of the Commission? Have you applied these iron and steel rates so prescribed to cover any other service?

A. We have.

Q. Is substantially the same case found in the matter of the class rates which are soon to become effective?

A. That is true (1645).

Q. We have dealt with the iron and steel rates, also with the class rates prescribed but not yet effective, and I will ask you if all freight rates prescribed by the Commission, except the iron and ore and all voluntary rates of the carriers, so far as you know, are made of an amount—made in an amount—that contemplates the complete service? (1646).

A. So far as official territory is concerned, I recall only one exception.

505 E. L. McCauley, Freight Traffic Manager, Western Maryland Railway, called as witness, and having been duly sworn, testified as follows (Vol. 2, P. 1746):

DIRECT EXAMINATION

I have prepared certain exhibits for filing. List No. 1 is a list of industrial common carriers or short lines connecting with the Western Maryland (1747).

The Western Maryland Railway serves no industries which have a system of tracks and which perform their own service to and from the interchange tracks and are given industrial plant facility allowances.

I submit List No. 2-B, which is a part of Exhibit 125 which shows industries having a system of tracks which perform their own service to and from the interchange tracks but are not given so-called indus-

trial facility allowances. The line-haul rates to and from these industries apply to and from the interchange tracks on such tracks as are ordinarily designated for the delivery and receipt of loaded or empties.

I submit List No. 2–C, which is a part of Exhibit 125 which is a list of industries having a system of tracks where carrier power performs the spotting service. The line-haul rates to and from these industries include the spotting and picking up of the loaded and empties within the confines of the plant.

I submit List No. 4, a part of Exhibit 125, which contains names of industries having ordinary private sidings or spurs where, of course, the carrier does the spotting work. The line haul rates apply to or from such private sidings of spurs. Coal mine sidings are not included in this list (1750).

Reference is made to the following tariffs published by the Western Maryland which contains charges or practices which affect the measure of the transportation service performed at the line
506 haul rates: I. C. C. No. 8128, switching charges at stations on the Western Maryland and between Baltimore stations on the Western Maryland and stations in Baltimore or other carriers serving that city, the charges are set out for the various services under heading of each town. This tariff contains the charges for local switching as well as the charges for switching from connecting lines which are in most cases absorbed under reciprocal switching arrangements at common points. I. C. C. No. 8153 provides for the absorption of switching charges on carload and less than carload property at junction points or with connecting lines (1752).

507 J. R. Downes, Chief of Freight Transportation, Pennsylvania Railroad, called as witness, and having been duly sworn, testified as follows (Vol. 3, p. 2056):

DIRECT EXAMINATION

I have been employed by the Pennsylvania about 30 years, all of the time spent with the operating department.

Mr. Orcutt, Counsel for Pennsylvania Railroad (interrupting). Mr. Director, I have distributed and have given to you a statement containing the industries located on the Pennsylvania Railroad, separated as between the common carriers, the industries performing their own service for an allowance, those performing the very service and receiving none, those where the railroad performs the service, and those where the industry performs part of the service and the railroad likewise a part.

The list referred to was received in evidence and marked Carrier's Exhibit 150, witness Downes (2058).

CROSS-EXAMINATION

At those industries now listed under Group 2–B–C in the exhibit the terminal service includes the placing of cars at the point of load-

ing or unloading, by the railroads in some cases and by the industry in others. In other words, the railroads may place the car at one section of the plant and the industry may take the car from a designated haul track and place it itself at some other section of the plant. Group 2–C, the service is performed entirely by the railroad—that is, has to only spot in the plant. Now, coming to the groups identified as 2–A, 2–B, the consideration that determines whether an allowance shall be made or not is convenience and economy to the railroad and taking into account also convenience
508 to the shipper. Generally, in reference to the railroad's convenience that is predicated upon a cheaper cost to the Pennsylvania system in allowing the shipper to perform service than if the Pennsylvania itself performed the service. As to whether there is some exception to that rule I would not be able to testify as to the individual cases, but my own understanding of all the cases that have come up is that it is more convenient and economical for the railroad to place the cars on the hold track than to go inside and spot them (2059).

In the instances under classification 2–A where an allowance is made I think they are generally based on the cost study made along about 1915 and 1916. I do not know the name of the committee you spoke of.

As between the industries 2–C where the service is performed exclusively by the railroad and under 2–A where the industry performs the service for an allowance, my original statement was that in the allowance it is generally considered from the standpoint of convenience and economy. A large number of industries do not care to do their own switching and apply for an allowance. In other cases the railroad may find it considerably more economical to grant the allowance than to do the work in the plant. From the operating standpoint it is entirely a matter of physical service, economy, and convenience (2060).

In cases where the industry performs its own service and no allowance is made, generally the railroad is probably ready and willing to do the spotting that they are supposed to do, but the industry for some reason or other elects to do it themselves, although the railroad, if the industry did not want to do it, would do the spotting. The basis used in reaching this classification under 2–B was it is an industry that is doing its own spotting and not receiving an
509 allowance without going into the reasons why they did not receive an allowance. The statement was not intended to outline why they did not receive an allowance or why they did (2061).

On Exhibit 150 under section 2–C, service performed exclusively by the railroad, there are some 833 industries. These are industries that, according to our view, have a system of plant tracks (2061).

In addition to that, we have a terrifically large number of industries having a single spur and the service is so simple we didn't think it necessary to list every single siding on the railroad. It would be

a guess on my part, but there must be a couple of thousand of them at least.

Q. And on all those industry tracks, including the industries shown on 2–C, on your Exhibit 150, it has been the practice of the Pennsylvania Railroad to place cars on those tracks where they would be conveniently loaded or unloaded?

A. On an accessible spot for unloading or loading.

Q. What do you regard as a system of tracks, Mr. Downes—for the purpose of the record?

A. Well, we use two or more tracks generally, although there might be some slight variation in that. A man might have three tracks and may be only using one of them as his track, and we considered it a simple siding; but generally where there are two or more tracks serving the plant.

510 The policy of the Pennsylvania, generally, is that the railroad, of course, wants to operate as economically as possible and when a question of allowance comes up the operating officer always considers it from the standpoint of whether it is going to help him keep his expenses down. That is generally the terms on which the operating officer would appreciate an allowance. There may be reasons that I do not know about, but as far as the operating department is concerned it is simply a matter of whether they can more conveniently and more economically deliver the cars through an allowance to the plant facility than to go into the plant and place it at an accessible spot for unloading. The company to which you refer where we made an allowance is on this list, The U. S. Cast Iron, Pipe and Foundry Company. With reference to your question as to the policy governing the granting of an allowance in one case and denying it in another when both plants were in competition with each other, I would say, from the operating standpoint there may be cases where it would be more economical for the railroad to do the spotting themselves. They may have a crew there any way and it may be to their advantage to do the spotting. In the particular cases mentioned, I am not familiar (p. 2065).

J. R. DOWNES recalled as a witness, having been previously sworn, testified as follows (Vol. 3, p. 2144):

DIRECT EXAMINATION

On Exhibit 150 which I have introduced in this case, the industries are classified in accordance with the column headings and all
511 locations on the Pennsylvania System are shown. Column 2 (c) lists industries where the service is performed by rail power and not by industrial power. As to whether or not there is any difference in the service of switching and placing of cars at industries or any difference *difference* of value of service to the shipper if we place at any of these industries as compared with any others except that one difference of degree; that is, whether it is one

car or 50 cars, whether the load is 1,000 feet long or 100 feet long, the operation is essentially the same. Of course, the distance the industry is from the break-up yard, the territory through which the switching crew and the runner will have to pass to reach the industry, and the number of cars to be placed or pulled, all are factors, but essentially the operation is the same. The switching crew or runner leaves the break-up yard going to the industry that does its own switching and puts the car on a designated interchange track. The effort of the carrier is to place the inbound loaded car at the point of unloading wherever that is possible and to pull the loaded car from the point where it was loaded to get it into the yard of the carriers and from thence into road-haul movement.

I know of no specific case on the Pennsylvania where the spotting service is performed within the plant by the Pennsylvania Railroad or pool power where the cars are placed only on written orders from the yardmaster of the industry. In most cases I am familiar with there are some employees of the plant who are always in daily contact with our yardmaster, if we have a yardmaster located in that particular territory. If we do not, he is in close daily contact with the conductor or the switching crew who really function as a yardmaster if there is no yardmaster. Now, we do not have the Keystone switching order which is filled out for movement beyond the spotting of the car by the railroad. That is for secondary placement
512 which is explained by the trainmaster and who goes to the agent and eventually a bill is made against the industry for the extra service performed. The crew, or rather the conductor or foreman in charge of the crew, in all instances is acquainted with the plant and their lay-out requirements and know generally from day to day where different materials are to be placed, and that is all arranged between the local railroad man and the plant man who has charge of the placing of the cars within the plant. Where the crew is acquainted with the plant requirements it is not necessary for the yard foreman to advise the crew that he does not want a car of ore placed on the coal track or that he does not want a car of coal placed on the ore track. It would be just the opposite. That is generally true of the service performed by the carrier power at all of the industries listed on my Exhibit 150, Column 2 (c).

CROSS-EXAMINATION

The program of the switching crew is worked out by the yardmaster or assistant trainmaster, that is the yardmaster of the railroad company (p. 2146).

As to whether or not our switching crew operating within the plant performs the spotting service whenever it is convenient for them to spot it or whenever it is convenient for the plant to receive it, there is generally a regular program that they place and pull at a certain time every day. There may be some exceptions. I am not familiar with them but as a general rule our crews start at the

same time and place their cars at the same time every day, and they pull their loads about the same time every day. In some cases in a large plant it might be necessary to maintain crews in the plant at all times depending upon the volume of work they have to do.

513 I think it is usually governed by the amount of work. If there is 8 hours work for the crew the crew would probably spend the whole 8 hours there (p. 2147).

514 I don't know of any change with regard to the spotting of cars in industries so that it is different today than it was in 1915. I was not identified with these matters in 1915 to the extent I am today. I was then in the general manager's office. Generally the methods and practice with regard to these terminal deliveries are the same today as they were in 1915, as far as I know; at least, there has been very little change in my own experience. I was Superintendent of Freight Transportation in 1923. Of course I have been in the operating department for thirty years (2151).

515 C. P. DIXON, Asst. Trainmaster, The Pennsylvania Railroad, was called as a witness, and having been duly sworn, testified as follows (Vol. 3, p. 2163):

DIRECT EXAMINATION

My name is C. P. Dixon. I have been assistant trainmaster on the Conemaugh Division, Pennsylvania Railroad for about 25 years.

I will explain just how the industry goes about it to get those cars taken inside the plant and placed on the plant industry track, where the carrier performs the service within the plant and where cars are received in volume; that is quite a considerable quantity and are first placed on the interchange track. On cars arriving in trains at the break-up yard the agent or his representative notifies the consignees of cars arriving and they advise the yardmaster as to what cars they want placed at the plant. Now under our arrangement through our yardmasters throughout the district they have an understanding with the various industries as to a suitable time to do their placing and spotting of cars and we try to meet up with the industries in that respect, cooperation between the yardmasters and the industries in order to do the work at the most suitable time. And they notify the yardmaster what cars they want and he in turn gives the conductor a work order and he goes and delivers the car to the plant. In most every case a representative from the plant industry sort of supervises the spotting of the cars. Of course, our conductors practically all know where the different cars go. Now occasionally there may be a move that the plant representative will want made that had come in after he had talked to the yardmaster and that is given to the conductor and turned over to the agent (2163–2165).

516 These industries shown under 2–C all have systems of tracks, two or more tracks, and we place cars inside those

plants on those tracks where they may be conveniently loaded or unloaded. That is the final placement with our own power. I have been in the Pittsburgh district approximately thirteen years and that has always been true since I have been in this district. I have been with the Pennsylvania Railroad forty years.

Q. Have you ever known any other practice than that with respect to loading and unloading cars on industrial tracks?

A. That has been the general practice during my time here.

Q. That is the general practice, in general usage, is it not?

A. That is the practice, where we place the cars where they want them spotted.

Q. You don't do that with a time-clock, I presume? You do it automatically?

A. Our crews don't carry time-clocks (2167).

517 HENRY W. BEYERS was called as a witness, being first duly sworn, testified as follows (Vol. 4, p. 3369):

DIRECT EXAMINATION

I am Vice-President in Charge of Traffic for the Chicago & North Western Railway Company, and I am testifying as to some of the general matters for account of all the western lines serving Chicago.

Mr. GAULT. I might state that Mr. Beyers is not a witness for the Chicago & North Western Railway Company, and as to the information which that Company has been cited to bring forward into this record. He is a general witness for account of the western lines.

Prior to 1902 there was no officially defined switching district or Chicago industrial district, so-called. Each line defined in its own way its local switching territory, and insofar as possible the interchange between the carriers was very largely through junctions within the so-called downtown district. Today the general interchange is through yards in the outlying sections.

In 1902 a so-called reciprocal arrangement was made between certain eastern carriers and the Chicago, Milwaukee and St. Paul Railway and the Chicago and North Western Railway. The object of that was to extend the Chicago rates of the road haul carriers to industries on the other carriers. From time to time that arrangement was either in effect, or changed, or cancelled and not in effect for a short period, until along in 1910 an agreement was reached between the carriers and all of the carriers in the Chicago district, which tentatively laid the foundation for what, in August 1911, became the first so-called Lowrey tariff.

518 The object of the arrangement was to bring order out of chaos. Prior to the first Lowrey tariff there are many instances where a shipper really had no means of knowing what his exact charges were going to be for a multitude of reasons, some of which are, as an illustration, certain carriers named their switching

charges on a per car basis subject to the marked capacity of the car.

In other words, a charge of $4 might be applicable to a load if it were in an 80,000 pound marked capacity car, whereas a 90,000 pound car would be $5, and a 100,000 pound marked capacity car would be $6. As against that method of making its charge the road haul carrier perhaps had a fixed rule that it would absorb under certain conditions $3 or $3.50, or possibly $4, but if a shipment moved and the load was in a 100,000 pound capacity car and could have been in an 80,000 pound capacity car, or lower, the shipper found himself with an extra $2 that he had not counted on in the game.

The tariffs also were not clear as to when intermediate services might be involved or, if so, whether or not such intermediate charges would be absorbed by the road haul carrier.

Another difficulty was enountered in the fact that certain carriers attempted or did charge in addition to the switching charge, a certain figure to cover the per diem for equipment, so that particular carrier had a total charge on its own equipment which was less than the total charge for a similar movement in a foreign car, because the per diem was added to the switching charge and put against the shipper.

There was no uniformity of practice either of tariff or otherwise. The tariffs were not necessarily controlling at all times, and as a consequence, there was just chaos.

519 At the same time, that is; along in 1909 and 1910, there was felt the necessity for not only a uniform basis of charges throughout the district—charges against the shipper—but the desire to create the Greater Chicago, to attract industries to this district, and to extend the so-called switching limits of the several carriers, thirty-odd in number.

The up-shot of that situation and the result of many discussions which were held by the shippers themselves, and also jointly with the carriers, was to create a Chicago district, officially described in tariffs naming rates and charges to the shippers; and also to bring about a uniform understanding as to what that Chicago official district really meant as against carriers when it came to the payment of per diem on farm equipment, and the per diem reclaimed, and at that time the rules of the American Railway Association defined the Chicago district being different than what was originally defined in the Lowrey Tariff.

Later on, or about that time, the rules of the American Railway Association pertaining to per diem and reclaim were made applicable in the Chicago district as defined in the Lowrey tariff (T. 3369–3371).

The shippers and the carriers through their respective committees which involved the traffic managers of the larger concerns in the Chicago district, and either the presidents or the traffic vice presidents of the railroads, created a Joint Conference Committee. At the outset, Mr. George Ingalls was Chairman of the Joint Conference Committee and also Chairman of the Carriers Section. That com-

mittee appointed a subcommittee after the tentative agreement
520 of May 1910 was reached. That committee appointed a special committee of eight railroad men to work out the provisions of the tentative agreement into tariff form. He was made Chairman of this Committee.

Our labors began immediately after that agreement was signed in May 1910 and the first real anchorage it succeeded in securing was when the tariff went into effect on August 1, 1911. By that I mean that before that time there was nothing official on file with the Interstate Commerce Commission or the state commissions but on that date the first Lowrey Tariff went into effect.

It resulted in giving the shipping industry, generally speaking, the application of the flat Chicago road haul rate regardless of its location in the Chicago district. It was conceded that in particular that was a great boon to industry and also helpful to the railroads.

With respect to intradistrict movements, the territory was divided into the inner and outer zones, and there the rates between the industries were made on the basis of the number of railroads performing the haul. In other words, it had rates for one line haul between industries, and two line haul, and a three or more line haul. That basis prevailed between all points excepting where the outer zone on the north side was involved, there was a different situation, the rates being usually higher than those just mentioned.

We encountered difficulty in harmonizing the territory at the outset because of this so-called outer zone which had to do with the western railroads more so than with the southern and eastern lines on account of the joint rates being in effect from eastern territory. As
521 an illustration, on the Chicago and Northwestern Railroad when you got beyond the city limits of Chicago on our Galena Division at 48th Street, we were immediately in the Aurora Group, which I believe at that time was on a 112 per cent basis, that is 112 per cent of the New York-Chicago rate was the yardstick for rates from Eastern Territory to points immediately west of 48th Street, and as far as Proviso, all of which today is in the Chicago district (T. 3371–3372).

On the North, the moment we got beyond Mayfair and Deering, where the Milwaukee and Northwestern roads go north and northwest, we were immediately in the Milwaukee Group. I mean that from Trunk Line Territory the Chicago rate did apply because the Milwaukee Group was a 100 per cent group; but when you came farther west in eastern territory, particularly up into the Central Freight Association Territory, then the Milwaukee Group was on an arbitrary over Chicago, the result being that you naturally had the Chicago rate from the Trunk Line Territory but an arbitrary from the Central Freight Association Territory.

That has all been changed, of course, and today industries in the entire district on road haul traffic, generally speaking—there are some few exceptions because of unusual conditions—but generally

speaking every industry in the Chicago District that has its individual or private sidetrack enjoys the flat Chicago rate of all road haul carriers that enter the Chicago Switching District.

In addition to that, in the outer zone I think in all cases the public team tracks of the several carriers are open each to the other; and in the inner zone the application is not extended very much beyond the industry with individual or private side
522 tracks, that being so because Belt Railroads, as an illustration, are prone to open up all of their team tracks to road haul carriers, whereas road haul carriers must, of necessity, confine their own facilities within the inner zone to their own account. Historically, I think that gives a rough outline of what took place, beginning about 1902. It brought order out of chaos, regardless of the fact that, to my way of thinking at least, we got the short end of one slogan (T. 3372–3373).

We had two slogans to work to. One was Greater Chicago; and the other was to take the thin with the thick; but my experience has caused me to believe and to realize beyond all peradventure of a doubt, that the railroads got too much of the thin. But aside from that, in principle the scheme was perfectly all right, and has really stood the acid test.

To my knowledge there have been I think but two cases before the Commission, complaints, since August of 1911, since the advent of the Lowrey Tariff. In other words, the rate structure has undoubtedly taken very good care of industries throughout. It is the largest switching district that I know of in the United States, or the world, for that matter. Its area is greater than any other district in any city in the United States. It extends not only beyond the confines of the City of Chicago, but into the State of Indiana. It extends even today beyond what by operating officials is considered the Switching District. In other words, the outer zone really runs into sections where the length of the haul calls for road haul service rather than switching service. Nevertheless, the territory as it is now defined and covered in the Galligan Tariffs reflects what is known as the Chicago District (T. 3373–3374).
523 It just gives you a concrete idea I hope that from 1902 to 1911; if you had to put up with those conditions today, why it would simply mean chaos. It would be next to the impossible so far as complying with the law and the orders of the Commission and one thing and another. We simply could not get along under those conditions. We did get out in the open and reached a method of understanding, and a method of procedure, and a rate basis that on the whole I think was very satisfactory.

The late Edgar Clark, who was with the Commission at the time the committee started our work, took a very keen interest in the development of the scheme. Whenever we called on him he gave us all of the time we wanted, and when we had our first tariff in form for filing with the Commission, he read every figure, every

word, everything that was in print in that copy from cover to cover, and gave us his judgment, he was more than pleased with what we finally worked out, because he told me that the Commission had made an attempt to figure out what the switching conditions in the City of Chicago with its rate adjustments really were, but he said the further they got into it the less they felt they knew about it.

The tariffs were not at all coordinated. Generally speaking, each line built its own tariffs, decided what it was going to absorb, where it was going to absorb, and what it was going to charge, and no two tariffs fitted together.

When I spoke of the fact that the railroads got the thin end of it, I had in mind the increase in costs and operation. I think the development of the district naturally resulted in greater expense to the carriers in the matter of operation. Take the Chicago and Northwestern Railway, as an illustration, in 1911 our principal interchange was at Wood and 40th Streets, within three miles
524 of where this hearing is being held. As time went on and the territory developed, it spread southwardly more than northwardly and westwardly. The Gary District on Lake Michigan came into existence. That augmented developments then north to South Chicago. What I am trying to say is that the development was very large from South Chicago south to Gary.

Then the old Stickney track, which is the nucleus of the central manufacturing district now—there has been a great development there, and large industries have gone down into the Indiana section across the Illinois-Indiana line, all of which has greatly increased the average haul that we were confronted with at the outset, when the big end of the business was done near the hub of the City of Chicago, rather than through the outlying yards (T. 3374–3375).

Dir. BARTEL. Now, that the Chicago District is as you said, the largest in the United States and in the world, would you be in favor of the curtailment of that switching territory?

The WITNESS. From a rate standpoint, or from an operating standpoint, do you mean?

Dir. BARTEL. Well, both.

The WITNESS. I do not know that I could give you anything really worth while from an operating standpoint, other than what is based on observation, but I do not think it can be improved upon. That is, I mean the entire district from an operating standpoint; and certainly from a rate standpoint I do not see how you could possibly undertake to have other than the application of a uniform rate basis, if you expect the district to grow.

525 Director BARTEL. What I had in mind was this, would you be in favor of somewhat limiting the Chicago Switching Area or Chicago Switching District as it is termed?

The WITNESS. I would not cut it down if it meant a different rate basis for the chap that is outside than for the one that remained inside.

Dir. BARTEL. You have that situation now, do you not?

The WITNESS. No.

Dir. BARTEL. A man just outside of the Chicago Switching District is on a higher basis, is he not?

The WITNESS. Oh, that is quite true; there must be a line somewhere; but I think it would be a mistake to try and pull in that line today, for the reason the District as a whole really spells Chicago, whether it is going south into Indiana or west as far as Desplaines or on the north. I think it would be a mistake to try and segregate it, because if you disrupt it, you might disrupt both service as well as your rate adjustment.

It would not be fair to the man located in the district on the assumption that he was on the Chicago rate basis. That is being offered him whenever he comes along. Any industries that come along now are told that the Chicago District rate prevails in and out, subject to certain stipulations, of course.

All industries that have their individual or private side tracks, when it comes to the road haul movement the Chicago rate applies to them, i. e., rate adjustments made under the Lowrey Tariff. They have dropped out certain adjustments from that original intention—coal, as an illustration, from the East. The Commission has fixed the coal rates so that they are not on that basis, and today instead of paying the flat Chicago rate throughout the entire district on coal from the East, we run into arbitraries when you go up on the north and northwest side (T. 3375–3376).

526 CROSS-EXAMINATION

This plan, as far as the shipping interest is concerned, is working out in the most economical and efficient manner. The principle is correct and, except for some improper rate adjustments, it is of mutual benefit as between railroads and between shippers and railroads. I would not suggest any change in principle. The Chicago road haul rate established and maintained by these railroads applies to all industries that have their individual or private side tracks.

The rate includes the spotting of a loaded car for unloading and an empty car for loading, and the road haul carrier, in extending the Chicago rate to the industry, pays the intermediate or the terminal carrier or both, if both are involved, their respective charges. I do not recall of a single case where a charge in addition to the road haul rate is assessed for the delivery service within the Chicago Switching District, particularly the spotting of the cars and the loading and the unloading, unless it is the Commonwealth Edison Plant at Avondale, where their private side tracks are equipped with electrical apparatus and operated by electric locomotives, and where it was understood at the outset between the industry and the railway company that the railway company would not go beyond the inter-

change track. There may be similar situations throughout the district, a few of them, but I do not know of any. There is no charge to the Edison Company by the railroad. We go to the interchange track and they do their own spotting. No allowance is made to this plant. The road haul carriers take care of the cost of terminal deliveries by absorbing the switching charges.

527 So far as the shipper is concerned, he knows that if his gross revenue from point of origin to Chicago or from Chicago to point of destination is the amount prescribed in the tariff or higher, that he has the application of the Chicago rate. He need not concern himself at all about the settlements between the road haul carrier and the terminal carrier. That is a matter of divisional arrangement.

The rate is applied in the first instance, and then the carriers make their settlement between themselves in interline accounts, each charging the other for the services performed on the basis of divisions which are a matter of record between the carriers. If the road haul charge is $30, the tariff tells the shipper the Chicago rate will apply. The shipper has no concern as to what the local switching charge of the terminal carrier may be. That switching charge does not enter into this transaction at all, because the tariff tells the shipper that the Chicago rate will apply to the private track of the industry, and that ends it. Then the road haul carriers settle under a divisional sheet with the terminal carrier for its services. It is not stated to the shipper that the carrier will only absorb ten dollars and that the charge of the terminal line is twelve dollars. The shipper is simply told that the Chicago rate will apply. The tariff either states that the Chicago rates will apply, or in the event of the gross not being sufficient to take care of the movement on the basis of the Chicago rate to or from the industry, then the minimum charge, which I think is now $19 per car, will be assessed, so

528 if the road haul rate, for the sake of discussion, were $10, and the switching charge were $10, that would be $20, but under the tariff you would pay $19; you would get your delivery and the railroads would have to absorb the difference. I understand that a study has been made to determine the effect upon the revenues of the railroads serving the Chicago switching district, but he did not participate in that part of the program, and only know, in a general way, the result of those studies.

The operation naturally determines the cost, and when it comes to the question of compensation for terminal services performed under a road haul rate, where the Chicago rate is applied, that is a matter of barter between the railroads. The shipper is not at all interested there, and very naturally the terminal railroad would put up to the road haul carrier its situation as to its costs, and then they would try to agree, and do agree as a rule, that the terminal carrier should be allowed a certain sum for the service it performs.

Now, the services of the terminal carriers throughout the district are varied. They are not all alike. Some perform an intermediate

terminal service, some a terminal service of greater or less magnitude. So far as the divisional factor for terminal service is concerned, in days gone by studies have been made, I do not know just how recent on that score, but that is a divisional factor to the terminal carrier, paid for by the road haul carrier.

So far as the intra-district switching charges are concerned, I understand a study has been made in connection with a case that is before the Interstate Commerce Commission, and there everything is a matter of record, I take it.

That is about all I can tell you on the point of studies. In later years, I have not followed these matters as closely as I did formerly.

529 In speaking of an arbitrary in the Chicago coal rates he meant that these rates from the East to certain sections of the Chicago District are on a basis prescribed by the Commission. This results in a charge somewhat higher than the flat Chicago coal rate. The coal rates to points in north Chicago are higher than the Chicago coal rates, but on all other commodities the flat Chicago rate applies to North Chicago. The latter are made in cents per ton above the flat Chicago rate (T. 3376–3384).

This does not result in a very substantial benefit to the carriers, I have no suggestions to offer to relieve the "thin" profits received by the carriers in this adjustment other than those made to the Commission in the Chicago switching case.

The reciprocal switching rates are generally lower than the industrial switching rates. This is because of the reciprocal feature. A study was made of this feature. This is where the carriers had to take the thin because there are certain road haul carriers that operate their trains into this Chicago Switching District that, you might say, have no terminals at all. With roads such as that, it is not in the strict sense of the word reciprocity to make an arrangement with a trunk line carrier that has large terminals, and one switch for the other, and so we used to make those arrangements on the straight rate basis on the theory that it was reciprocity. But the shippers thought that the whole district should be unified, and in order to do that, we had to have a uniform basis throughout.

In some instances the reciprocal switching charges are less than the actual cost of the service. If a shipper gets the same rate for a movement between two industries within the Chicago District, where the mileage over one railroad is approximately 60 miles and
530 the mileage over another is 12 miles, one of the two is going to perform service below cost. This is based on the fact that the charges have always been close to the switching cost. This burdens the switching line. Take, as an illustration, the Indiana Harbor Belt Railroad from South Chicago. If there should be a movement from the Steel Plant in South Chicago to the Deering Harvester Company at Deering, the Indiana Harbor Belt and the B. & O. Chicago Transfer Railroad both come around the outer end of the District and hit the St. Paul or Northwestern and then they

go to Deering. When the tariff was first made the movement from South Chicago would be by the N. Y. C. or the old Michigan Central from South Chicago to 16th St., and then direct. That distance would be about 12 miles as against a possible 50 the other way.

This is the same situation that arises when any road hauls service on rates of the short line. But here there is a uniform charge. The rate was the same between the two industries when but one line was serving them regardless of where those two industries were located or by what line they were served. It might have been two industries within a block of each other on the west side, or it might have been where one was at the extreme south side or down in Indiana, and the other on the north side. The only difference in the charge was when there was a difference in the number of railroads required to serve.

If two industries were served by one railroad they had the minimum charge. If one was on one railroad and another on another and they interchanged directly, there was a two-line basis which was higher than a one-line basis. If one industry was located on one line and the other on the other and those two lines did not interchange directly but used an intermediate carrier, then it was a three line basis. In some cases there were four line services but a rate
531 basis of three lines was used as a maximum (T. 3384–3386).

Since the Lowrey basis was established, the Illinois Central has constructed its Markham Yard and the Northwestern its Proviso yard. Both are on the outskirts of the Chicago District. The necessity of getting out of congestion, and not the price of the land, was the controlling factor in locating the yards at these points. I did not mean to imply that there is a wasteful service due to the 50 mile haul today against the more economical service at the 12 mile haul, I had two things in mind—(1) The average haul has increased throughout the District because of the development throughout the District. This development has made it necessary for railroads to establish outer yards beyond the confines of the downtown district, and so far as the service being greater by one railroad than another is concerned, it does not necessarily follow that the business moves through that channel by the point is, that, all routes are open, and we have unification in every way. The yardstick was a uniform rate for a one-line haul regardless of distance; another figure for a two-line haul regardless of distance, and a third figure for a three or more line haul regardless of distance. All routes are open (T. 3386–3387).

It might be less expensive, according to the trend of tonnage to move this traffic from Indiana Harbor to Deering by the 50-mile belt line route than by the 12-mile route through the La Salle Street Station. In instancing that, he did not have in mind a circuitous route meeting the competition of a direct route. He has never known an outer yard designed and built for purely operating purposes located so as to be in keeping with some peculiar kink in a rate adjustment. It is a matter of physical handling and not a question of how the rates are made. The Chicago District has not been enlarged substantially since 1911, because of the requests of
532 industries. There have been some modifications of the orig-

inal boundaries. Some difficulties have arisen because of differences of opinion among adjudicating bodies. So that there are certain situations where the boundary on interstate traffic is different than on intrastate. The rate situation in Chicago is that, on a very large volume of traffic brought in over a line-haul carrier and finally unloaded at an industry track on a switching line, the flat Chicago road-haul rate is applied without any additional charge for switching service, subject to the minimum revenue spoken of. This has been established through the medium of rate tariffs and division sheets without any absorption tariffs. The Lowery tariff is not a division sheet. It publishes the rates to the shipper. The division sheet is a separate issue that is filed with the freight departments of the interested carriers for purposes of settlement between carriers. There is nothing in the tariff as to the division and the manner of dividing the rate that is in a division sheet that is used by the carriers' accounting departments. The shipper pays the charge to the road-haul carrier and is then through. I do not know how the carriers divide it. It is the same as a joint through rate. It is not any different, in the final analysis, than if the same results were given by absorption tariffs by which it would be published that the switching charges of the Chicago switching lines would be absorbed under road haul rates.

That was one difficulty before 1911. It might have been that a carrier had a switching charge of $6.30 a car according to the way the charge was figured. A tariff might have been published that said that there would be an absorption of $4.20. Because of the schemes being interwoven throughout, the full switching charge of the terminal carrier might have been paid in addition to the road haul rate. Then the shipper might have come around and said to
532 the carrier: "I would like to have you absorb it." The carrier would say: "We can only take care of $4.20." He thinks it is better to do this in one bite. It is much simpler tariff than the absorption rules, particularly for the shipper.

The volume of Chicago & Northwestern traffic into Chicago which finds its ultimate unloading on some other railroad is much greater than the volume delivered to any switching road it reaches. This is generally true of all trunk lines reaching Chicago.

The divisions allowed by the road haul carriers to the switching lines in Chicago are apt to be less than the switching rates published by the switching lines in the Lowery or any other tariff (T. 3387–8392).

534 J. F. LORD, Asst. to the General Manager, of the Chicago & Eastern Illinois Railway Co., called as a witness, and having been duly sworn, testified as follows (Vol. 4, 3611):

DIRECT EXAMINATION

My name is J. F. Lord. I am Asst. to the General Manager of the Chicago & Eastern Illinois Railway Co., and familiar with

the operating practices in connection with the terminal services rendered by that company.

I have prepared my testimony under different heads. Among other things, I will give testimony with reference to industries on the line of the Chicago & Eastern Illinois which did their own switching (p. 3612).

There are no industries on the rails of the Chicago & Eastern Illinois at Chicago which perform their own plant switching.

The Moulding-Brownell plant at Thornton has its own power and system of tracks. This corporation manufactures crushed stone. Their tracks connect with those of the Chicago & Eastern Illinois, Illinois Central, Baltimore and Ohio, Chicago Terminal, and Chicago, Milwaukee, St. Paul and Pacific. One of their tracks leads to a yard which we have at that point adjacent to our main line. Empty cars are taken by that corporation's power from our yard, loaded and returned to our yard. They load as many as 160 cars of stone a day under their crusher bins on a track space of about 10 acres. Constant service is required at the plant to accomplish this loading. They load for several railroads and it is evidently to their advantage to use their own power.

At Chicago Heights the Railway Steel Spring Company does its own plant switching. It receives cars there from the Chicago & Eastern Illinois and other carriers. We place the cars on the plant
535 interchange track and the Spring Company spots the cars at the plant and returns them to the interchange tracks where our engines take them out. Presumably by reason of the conditions that exist in their plant and as a plant convenience they find it desirable to do their own intra-plant switching with their own power.

At Terre Haute, the American Car and Foundry Company owns its own tracks. The cars are placed on a designated interchange track with this plant at which point delivery is effected the same as if placed in the plant by the railway company, and the plant power then spots the cars. The Car Company at one time requested the Railway Company to perform spotting service in this plant. However, the practice was soon discontinued because of physical characteristics of the track lay-out and expense involved in intra-plant switching, it being found it would be more economical for the industry to perform their own switching than to have the railroad do it.

At Vincennes (Alice) the O'Donnell Sand & Gravel Co. has an engine which spots its empties and shoves the loaded cars out on the lead for our engine to handle. The tracks at this plant are in such shape that we could not get in there with our own power. Owing to the need for changing the track lay-out in the gravel frequently as the work progresses in the pit, the Gravel Company would not put in a permanent track lay-out that would accommodate our power.

None of the industries on our line at Evansville do any terminal or plant switching. At East St. Louis and St. Louis there are no industries on our rails which perform their plant switching.

At Mt. Vernon, Ill., the Mt. Vernon Car Mfg. Co. does considerable intra-plant switching when the plant is in operation with its own power. The Chicago & Eastern Illinois, as well as
536 other roads serve this industry, placing cars and taking cars out of the plant particularly when it is in full operation. If the railroads were to perform all the switching it would interfere with the plant operation. The Car Company prefers to perform this switching as a matter of plant convenience and to save intra-plant switching expense.

The foregoing are the only instances on our road where industries perform their plant switching and they all do their own switching without allowances (pp. 3615 and 3616).

The next division of my testimony relates to the terminal services rendered on the line of the Chicago & Eastern Illinois where the industries have a system of tracks, two or more, where originating and delivering service is performed by the Chicago & Eastern Illinois.

At Evansville, Ind., among the larger industries is Servel, Inc., which manufactures automobile bodies, refrigerators, gas engines, ice machinery, and other products. The service rendered this company at Evansville is typical of that rendered to the other large industries at this point. Using Servel as an illustration of the terminal service to the other industries at Evansville, it is found necessary to perform some service at this plant as often as three times in a 24-hour period. Raw material received during the night, as well as empties ordered for loading, are placed early in the morning. Certain tracks where most of the loading and unloading is done are pulled at noon when loads that arrived during the forenoon and additional empties are placed. This is made necessary account of the volume of traffic handled and the limited track space. After the plant closes in the evening the loads are pulled and classified for road movement or delivery to connections. There are 7 tracks serving this plant and 75 locations where cars may be spotted. The average loads handled at this plant per day is
537 18 and the average time consumed in switching at this plant is approximately four hours per day. It is some times necessary to re-spot a car for this industry, as well as for other industries, for which service an intra-plant switching charge is made. A charge is also made for movements from one industry to another. Our switching costs at Evansville are about $18.01 per engine hour. This includes not only operating expenses, such as maintenance of way and structures, maintenance of equipment, transportation, general expenses, and miscellaneous charges, but also overhead items, such as interest on investment, taxes, etc. Strictly operating expenses would be in the neighborhood of $12 per engine hour at Evansville (p. 3619).

Referring now to the terminal service rendered industries on the Chicago & Eastern Illinois having one private siding, either privately owned, railroad owned, or jointly owned. We have many such industries along our line not only at the smaller points but also at the larger stations. At the smaller points the switching is performed by road crews. At the terminals where yard engines are employed, switching is generally performed by the same engines that do the work at the larger industries. My observation has been that one switch per day will usually satisfy these industries.

It is my opinion that on an average, no more time per car is consumed in plant switching for industries having a series of tracks than is consumed in serving industries which have only one private siding, and there are instances where more time is consumed in serving industries having one private siding than is consumed in serving larger industries with a series of tracks, for the reason that where an industry has a series of tracks switching can be performed with less moves and greater ease of operation (p. 3620).

With reference to the plant at Terre Haute where at one time we performed just a part of the service, it was discontinued because the track lay-out would not accommodate our power on all tracks and it was more expensive to the Car Company to have the
538 railroad perform the service than if they did it themselves. We made an extra charge for the intra-plant movements within that plant. It was not a spotting charge in addition to the line-haul service we performed within the plant.

539 D. S. FARLEY was called as a witness and being duly sworn testified as follows (Vol. 4, p. 3794):

DIRECT EXAMINATION

I am Assistant General Manager of the Eastern District, Eastern Lines, of the Atchison, Topeka & Santa Fe Railway Company. By the Eastern Lines of the Atchison, Topeka & Santa Fe is meant those lines north of Shawnee and Purcell, Oklahoma, and east of Hugoton, Kiowa, Newton, and Englewood, Kansas, and Superior, Nebraska. My testimony will cover the Eastern lines as thus described (3794).

There are no industries on the Eastern lines of the Atchison, Topeka & Santa Fe Railroad which perform the service of spotting cars, and which receive allowances from the railroad for such service. There are industries on the Eastern lines which perform the service of spotting cars and which receive no allowance from the railroad for such service; these include: the Consumers Company at McCook, Illinois, the Humboldt Terminal Railroad which is a subsidiary of the Humboldt Cement Company at Humboldt, Kansas. They perform the spotting service and no allowance is made. There are other industries with systems of tracks where the Atchison, Topeka & Santa Fe itself does the spotting. Those industries that have an engine of their own usually employ it in doing such intra-

plant work as they wish to have performed and they do not want the railroads to perform it. We do perform the spotting of cars that come in over our line, but an intra-plant move we do not do. Industries of the class just mentioned are: Crane Company at Chicago, Galesburg Coal Mining Company at Knox, Illinois, Monarch Cement Company, Humboldt, Solvay Sales Corporation,
Moline, Kansas, Ash Grove Cement Company at Chanute,
540 Kansas, Dewey-Portland Cement Company at Dewey, Oklahoma, Sugar Creek Refinery (a Standard Oil company), Sugar Creek, Missouri. Those are about the only ones I can recall now that have engines.

Where and when the railroad company does the spotting on these industrial tracks, that service involves our taking the car to the industry and placing it at certain locations for loading and unloading. At to whether there is just one movement of putting the car in or taking it out to its final place for loading or unloading on the industrial track: That is the result, but it requires more moves than that in order to get the car to a certain spot. But it is the terminal service originating and delivering car we perform on the industry's own track. The only essential difference in serving an industry having one track and an industry having a system of one or more tracks is in the amount of business, number of cars to be handled. The essential operation is exactly the same (3797–3798).

We have some industries within my jurisdiction where it is necessary to assign an engine for the exclusive purpose of spotting cars on the plant tracks. For instance, Crane Company at Chicago. There are 5 railroads that enter that plant, we being one of them, and the 5 railroads have arranged for the Chicago, River & Indiana to do the work. That engine is engaged in that work all of the time.

At the Sugar Creek Refinery at Sugar Creek, Missouri, we have 2 engines, one leaves at 6 o'clock in the morning and goes out and works until two; another goes out at 10 o'clock to Cement City, comes back to Sugar Creek, gets there about 2 o'clock and remains the balance of the afternoon, and comes in in the evening with what is empty. Sugar Creek is about eight or ten miles from Kansas City. The Sugar Creek Refinery is within the Kansas City switching district.

Other industries where the exclusive use of a locomotive is
541 necessary to perform the plant spotting service are: Quaker Oats Company, St. Joseph, Missouri, similar to the Crane Company here, Roxanna Refinery at Arkansas City; another refinery at Coffeyville, Kansas, that is served by the Missouri, Kansas & Texas, the Missouri Pacific, and the Atchison, Topeka & Santa Fe. At those plants that I have described the spotting service is performed in accordance with instructions given by the plant, that is, at times and places to meet the plant's convenience. We spot the oil cars to the loading racks, deliver the loads, spot their different products to the different houses for unloading and loading, and we take

out the empty just the same as when spotted. As to whether we do that generally for all industries: No different in any of these industries; all handled the same way (3803–3805).

542 Q. Do you regard your service as rendered to the industry on its private track as any different in physical performance than your team track service?

A. I regard it as a duty that we have to perform. That is, it is incumbent upon us to make delivery of this car at a certain spot on the industry's track. If that is what you mean (3813).

Q. No, I mean—I am thinking of it now more in terms of operation, of physical performance, having in mind—I am stating this now from just general testimony given in the record and my own general knowledge—in your movement from your train break-up yards to your team track where you have a group of cars to place on the team track, I understand that you usually shift those in at a location that is open and convenient to make them accessible to the team. And it is a matter of your own operating convenience (3813).

Now, I also understand that when you enter an industry with a couple of cars, four or five of them, that they cannot be placed in the same manner. That some additional work must be done there. That you have to put the coal on the coal track and some other commodity on another track. You have to drill those cars around in order to get them on the particular spot where they will be accessible to the consignee in the place the consignee wants them (3813).

A. That is true, but it also is true on our team tracks.

Q. That is what I want to have you compare.

A. I will refer you again to our Kansas City team track. The same thing would apply to Chicago. We get a good many cars of hay in there that goes in on the team tracks, and certain tracks are set aside for this hay.

Q. I see.

A. We get fruit in there that must go on the other team tracks. We set aside these other tracks for fruit. And sometimes we have to pull empties out and put other cars in, and I would say

543 comparing the industrial work with the team track work, sometimes it is more expensive and sometimes less. It depends entirely on the nature of the team track and the work we are handling (3813).

Q. And the assignment of team track space for a particular commodity like hay and fruit is a matter of operating convenience to you, and also of mutual convenience to the receiver of that particular kind of freight?

A. Yes.

Q. That is the reason for it?

A. We put the hay on one place and the fruit on the other so that they won't have a lot of trucks up there pulling out fruit at the same time they have trucks pulling out hay on tracks where inspection is going on (3814).

Q. But generally in reference to your team track service you do not spot cars at a particular location designated by the consignee excepting such things as hay and fruit you have set aside a particular location on the team tracks?

A. I would say there are some places spotting cars at a particular location where it is almost impossible to get away from. For instance; maybe I can explain it this way:

A car of fruit comes in—or we have a track that is occupied with several cars of fruit. Here is a truck drives up there and he commences to unload a car of fruit on this location. And about that time, after he gets started we get a diversion order on a car of fruit that is beyond that. That must be gotten out of there so as to make connection with some train (3814).

We go in and pull this car out and set the other car back to his truck where he was. We do not ask him to go somewhere else because he has already backed up ready to unload. We have some of that (3814).

If you had a particular spot where we had been unloading all the time and we could get the cars to you conveniently, we would put the cars there. If not convenient to us without drilling the team track, you would have to wait until it is convenient for us to put it there. That is the general rule (3815).

544 Now take the Crane plant where we have pool service. They have a system of four or five tracks, a little yard you might say right on the west side of their plant inside their gates and each line delivers its stuff on these tracks and pulls its cars from those tracks and those cars are taken from those tracks and placed where they are to be loaded or unloaded and brought back there for interchange with the line that handles the plant (3819).

The crew of the pooled engine works under the yardmaster of the plant just the same as any other—if there is only one track there he would work under the instructions of the man that had the car and the one spot (3819).

Q. Would it be possible at that plant, at the Crane Company, for the carriers to spot the cars directly after bringing them from the break-up yard and spot them at the various points within the plant, instead of first placing them on the receiving tracks just inside the plant gates?

A. You mean each road handle its own cars?

Q. And place them at the yards?

A. I would say no.

Q. Why?

A. Well, there are five railroads. They may have the same kind of material coming in over the five different railroads. They may want it on one track. We might go in there and place a car at a certain spot, and the Illinois Northern might have another car that they wanted placed on beyond that somewhere. And the Illinois Northern would have to take our car off and place theirs, and then put their car back (3830).

All of that is overcome by having a pool engine. It does all of the work at once instead of having to drill around in there. There would be times when there would be five engines over there, that is four waiting for one to empty (3830).

545 Q. I have in mind terminal in the larger industrial plants, such as the Standard Oil or the Crane Company at Chicago. I take it those large industrial operations have to have the service when they needed it. Have to have their cars moved at the time they needed them moved?

A. At the Crane Company at Chicago, there is an engine there assigned to do the railroad work all of the time.

Q. Whenever the industry needs something done, the engine is there to do it?

A. They spot the cars. Don't do any intraplant switching.

Q. I don't mean intraplant switching, I mean bringing in of the loads and making the first spotting?

A. That is right (p. 3816).

Q. Now, this Consumers Company, do you know anything about their plant lay-out?

A. I have walked through some of it. I have not walked through all of it, but some of it.

Q. Are their tracks such that the Atchison, Topeka & Santa Fe could operate within the plant if requested?

A. They have the standard gauge, of course, and use standard gauge equipment. These engines are standard gauge, but our engines are so much heavier than any I ever saw over there that I do not know that they would want us, or we would want to send our heavy engines on to some of their tracks. Their lead tracks, as I recollect, are all right, but some side tracks, I do not know whether they would want us, or whether we would want to put our engines in there.

Q. They never made request upon you to perform the switching service?

A. No, sir.

By Mr. BURCHMORE:

Q. Is that the McCook quarry?

A. McCook quarry; yes, sir.

By Dir. BARTEL:

Q. Take the Humbolt Company, Humbolt, Kansas; do you know the plant lay-out there?

A. Yes, sir.

Q. Are their tracks such that we could operate over those tracks if requested?

546 A. Well, the same thing applies to their tracks as applies to the McCook plant. We have engines in our equipment that go in there. But that is a wayside industry between terminals. And our local power could not go into all of those tracks. We could

go into some, but there are some that the curvature is such that our large engines could not negotiate those curves (pp. 3818, 3819).

547 The Santa Fe will frequently deliver one car or two or three cars at an industry having an ordinary side track. In that case, there is no great amount of switching service involved after the car leaves the break-up yard. Simply one switch crew comes to the industry, they take this particular car and put it in there (3821).

Q. Now, take the Crane Company. Business is supposed to be depressed today. Suppose the Crane Company only got one car of freight a day over the Atchison, Topeka & Santa Fe, would you have any difficulty in taking that one car and spotting in there just like you spot one car at the little industry across the street, perhaps, or down the line a piece?

A. If there was only one car on all of the five railroads, and there was not five switch engines in there with one car each trying to spot it, yes.

Q. I am not taking quite such an extreme case. I said, suppose the Atchison, Topeka & Santa Fe only had one car and each of the other railroads had only one car. Wouldn't be much trouble about them taking that one car all of the way instead of leaving it at the gate of the industry would there (3821)?

A. I understood you to ask if it would be much of a job to spot it where they wanted it.

Q. To perform the whole spotting service in one run if they only had one car a day over each railroad.

A. I told you it would not, provided there were not four other railroads in there waiting for the same spot (3822).

Q. If each one had only one car there would not be much trouble, would there?

A. Only as I have explained before.

Q. Now, isn't the fact that the Director asked you about at the Crane Company really due to this:

548 That the company is a large company and has a large volume of traffic. And having a large volume of traffic you cannot take a whole lot of cars in there and take them clear through to their final placement without stopping them somewhere?

A. That is correct.

Q. Would you rather have on your lines at Chicago, 100 industries, each getting one car a day or one industry getting 100 cars a day in point of terminal service?

A. Well, I suppose I would have to answer that we would rather have one industry, if it was just equal all the way through but I never heard of a case of that kind.

Q. I am getting down to this: there is a certain amount of work necessary incident to the volume of business.

A. That is true (3822).

Q. Well, is it a fact that all over your system there are industries having private side tracks connecting with your rails that you will place the car at the point where the consignee removes the freight from the car unless the consignee has an engine of his own and does the service for himself?

A. That is correct.

Q. And as to outbound traffic at all industries, you will place the empty car at the point where the consignor puts the goods in the car?

A. That is correct.

Q. And you move the car from its place of loading or unloading to your break-up yards and then over your system to the junction with another road for final destination?

A. Correct.

Q. I will ask the Traffic Man about the rates on that service, but you, as a carrier, do the work to the place where the goods are taken out and from the place where the goods are put in if the industry's rails connect with your line (3823)?

549 A. That is correct.

Q. Now, you were asked about the team tracks. There was one feature of the team track service I did not hear you mention. Does it frequently happen on team tracks that the consignee fails to unload the entire contents of the car in one day, and the unloading has to be completed at a later date?

A. That is a practice; yes, sir.

Q. Do you police the contents of that car to see that the goods are not stolen, or does the consignee do that?

A. We have our watchmen, and we seal the cars. We close the doors, but when the man breaks the seal and goes in to get his freight, it is up to him, it is his business from then on (3824).

Q. It is during the day time, but not over night?

A. If a car was broken in over night we endeavor to get the thief if we can.

Q. I am not asking that question. Suppose the consignee at five or six o'clock in the evening stops unloading for the day. And then resumes his unloading the next morning at seven or eight o'clock. During the night time do you not police the team track and seal the cars?

A. We do.

Q. Now, then, in such case when your switch crew comes along in the early morning hours to place other box cars on the team tracks, do you not frequently have to remove a partially unloaded car to get out cars that have been completely unloaded, and then replace that partially unloaded car on the team track?

A. Yes, sir.

Q. And those partially unloaded cars may be scattered among the cars as to which loading has been completed?

A. That is correct.

Q. So there is considerable measure of drilling required then on the team track?

A. That is a fact (3824).

550 Q. You were asked whether your yard engines switching a plant like the Crane Company obeyed the orders of the Yard Master of the plant. Well, that question might be construed as meaning either of two things (3825).

That he gave you the necessary instructions which the crew reasonably ought to comply with, or it might be construed to mean that you just gave them an engine that they boss around to suit themselves, regardless of the cost to you. What is the fact there?

A. The facts are that the Yardmaster of the plant, or Superintendent, or whose ever duty it is to see that these cars are switched, gives the Foreman a switching list. Tells where he wants these cars. They will get a list of the cars—where they are delivered by the roads, and then he will make his switch list to the Foreman, and he sets the car (3826).

Q. And is that a reasonable necessary step in the process of placing cars at that industry, is it a good way to do it?

A. That is the only way to do it.

Q. Can you think of some better way to do it by which the Yardmaster of the plant was left out of the thing, had nothing to do with the thing? Your men figured it out for themselves?

A. If you had a big plant like Crane, and you left it to the engine Foreman, and he was thoroughly familiar with the plants and where their different houses were, and where their docks were, he would probably figure that out and deliver the freight just as well as having a Yardmaster to do it. But he is not employed to look after that kind of stuff. They are supposed to give the orders where they want these cars and he tries to comply with the orders, to put them at these certain docks (3826).

551 Q. Do you think it makes for efficient service to have orders given in that fashion?

A. The switch list; yes, sir.

Q. Now, all along your line at the cotton seed oil mills and the other forms of industries I have asked you about, do you make it a practice to put the particular commodities at the approximate location within the plant that it is desired by the plant to have them?

I mean by that, do you put coal at the power house and put lumber at the planing mill, and grain at the grain chute, and all that sort of thing?

A. Yes.

Q. And in order to do that you must know the contents of the car?

A. That is correct (3826).

Q. Well, what the Crane Company gets from the Atchison, Topeka & Santa Fe, is it any different from what any other industry along the line gets? Namely, the placement of the car at the place they want to take the goods out of it? (3827.)

A. The Crane Company gets the same service as any other industry on the line. They get one spot of the loaded car, and one spotting for the empty car to load out (3827).

Q. And that spot is the placement of the car at the point where they want to take the goods?

A. Yes, sir.

Q. Or at the place where they want to, and do put the goods in if it is an outbound shipment?

A. Correct (3827).

552 G. F. VIVIAN called as a witness and being duly sworn testified as follows (Vol. 4, p. 3875):

DIRECT EXAMINATION

I am Statistician of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Chicago, Illinois. I have been connected with that railroad 17 years. My work includes investigation of terminals with regard to allowances and to efficiency in operating the terminals and such matters (3875).

My examination of the returns of all superintendents on the railroad indicates that there are on the Chicago, Milwaukee, St. Paul & Pacific Railroad 12 industries having a system of tracks (2 or more) which perform their own switching with a terminal allowance, 40 industries having a system of tracks (2 or more) which perform their own switching without a terminal allowance, 550 industries having a system of tracks (2 or more) switched by carrier power, and 4,149 other industries having a private siding, while there are a total of 1,918 team tracks on the Milwaukee Railroad (3877).

553 The industries which have terminal allowances are as follows:

Nekoosa-Pt. Edwards Paper Company, Port Edwards, Wisconsin, $1.22 per car.

Nekoosa-Pt. Edwards Paper Company, Nekoosa, Wisconsin, $1.42 per car.

Marathon Paper Mills, Rothschild, Wisconsin, $1.20 per car.

Mosinee Paper Mills, Mosinee, Wisconsin, $1.04 per car.

Sawyer-Goodman Lumber Company, Sagola, Michigan, $1.08 per car.

A. O. Smith Company, Milwaukee, Wisconsin, $0.85 per car maximum.

American Wire & Steel Company, DeKalb, Illinois, $0.76 per car maximum.

John Morrell & Company, Ottumwa, Iowa, $2.50 per car maximum.

Pacific National Lumber Company, National, Washington, $2.00 per car.

McKenna Lumber Company, McKenna, Washington, $1.50 per car.

Pacific States Lumber Company, Selleck, Washington, $2.00 per car.

Snoqualmie Falls Lumber Company, Snoqualmie, Washington, $2.00 per car.

Terminal allowances in the Western Territory are of relatively recent date. The records of the Western Trunk Line Committee show that in December 1923 a Terminal Allowance Committee was organized (3878).

This committee consists of representatives of 9 railroads whose duty it is to pass final judgment on whether or not it is proper that a terminal allowance shall be granted to a petitioning industry. On this committee are traffic, legal, and accounting representatives in order that all phases of an allowance request and the promulgation of an allowance may be properly handled (3879).

The original formula employed by the Central Freight Association was adopted in the first instance as the proper one to be followed in the preparation of terminal allowance studies on the railroads in Western Trunk Line Territory to determine the measure of the allowance (3879).

During the course of the preparation of the first studies under this formula, it was found that the formula was in inadequate inasmuch as it did not contain sufficient instructions to permit a proper preparation on a uniform basis of studies to be conducted at various
554 industries in the territory (3879).

As a consequence of the inadequacy of this original formula, a second formula was prepared, which, on completion, was found to be quite uniform with the provisions of a new formula now in general use in Central Freight Association Territory. This second formula was submitted to the Western Trunk Line Terminal Allowance Committee which approved same on October 16, 1929, and submitted the formula to the Western Traffic Executives with the recommendation for their approval (3879).

The Western Traffic Executives at their meeting of November 12, 1929, approved the formula for use on the Western Railroads, while at a subsequent time the Southwestern Railroads took similar action.

All of the latter studies have been conducted under this formula, which has been found to be very satisfactory in its application. Discussion has been had at various times as to the proper mode of procedure from the time a request for an allowance is made by an industry to the final granting or refusal to the industry of a terminal allowance. (3879).

There has been issued by the Western Trunk Line Committee a pamphlet dealing with the method of procedure both as to the application and the form of same as well as to the determination of the allowance, if one be granted (3879).

There is contained in this pamphlet a series of 8 pertinent questions dealing with details of the plant operation and its history insofar as switching is concerned, plant layout, condition of tracks, grades, curves, clearances, and other necessary details (3880).

Other factors are added from time to time which in the judgment of the Terminal Allowance Committee will give further assistance in the determination of whether or not an allowance shall be granted (3880).

At this time I wish to introduce as Exhibit 264 a copy of this pamphlet which illustrates the method of procedure now in force and is the procedure under which terminal allowances are being investigated, granted, or denied (3880).

555 This was received as Exhibit No. 264.

There are included on the list furnished by the Commission two industries having terminal allowances on which information is desired. These are: The Nekoosa-Edwards Paper Company, having two plants, one at Port Edwards, the other at Nekoosa, Wisconsin, and the John Morrell Company at Ottumwa, Iowa. See pages 15, 16, and 17 of Exhibit 263 for plant layouts (3880).

Taking up first the Nekoosa-Edwards Paper Company situation. Both plants of this company are served jointly by the Chicago and Northwestern Railroad, the Minneapolis, St. Paul & Sault Ste. Marie Railroad (Soo Line), and the Chicago, Milwaukee, St. Paul & Pacific Railroad (3880).

The terminal allowance situation has been very exhaustively analyzed and presented in a series of hearings before the Wisconsin Railroad Commission. During all of these hearings I acted as Chairman of the Committee, handling the preparation of these studies and presenting the major part of the testimony in each hearing (3880).

The Nekoosa-Edwards Paper Company work at both of these plants was being done by each railroad, principally the Soo Line, the intra-plant service being handled by a Soo engine which worked part of the day at Port Edwards and the balance at Nekoosa, the time in service being from 14 to 16 hours per day. Each of the railroads delivered to the plant and spotted the cars in accordance with plant orders given to the conductor at the time of arrival of the trains at the respective plants (3880–3881).

There naturally was some railroad interference between engines and some unnecessary work, inasmuch as one railroad's engine placed cars for unloading, to be followed almost immediately by another railroad's engine pulling the car previously placed in order to rearrange the unloading platform to accommodate its cars as well as the other railroad's cars (3881).

556 This gives a brief picture of the operations prior to the granting of an allowance to these plants. The industry filed its requests with the individual railroads and these requests in turn were forwarded to the terminal allowance committee which passed favorably upon the applications, and orders were issued to make cost studies (3881).

At this time the railroads were still operating the plants inasmuch as the Paper Company did not own power. The Paper Company was, however, negotiating with the Soo Line for the purchase of two

locomotives which were subsequently obtained. The first tests were conducted to determine the cost to the carriers of the operation of these plants by carrier power, the tests being run during the latter part of November and the first part of December 1927.

Having determined the cost to the carriers of performing this service, the next step was to prepare estimated plant costs for the same work. This was done by applying to the estimated plant costs for the equivalent number of hours of engine service worked by carrier power the relationship that interchange time was to the total time worked in each plant respectively (3881).

The resulting cost for interchange service was then divided by the number of cars handled in interchange service which gives the estimated maximum terminal allowance per car (3881).

These costs resulted in the granting of allowances at a hearing before the Wisconsin Railroad Commission in Docket Number R–3542 under date of July 18, 1928, of $1.96 maximum allowance per loaded car at Nekoosa and $2.35 at Port Edwards. In their decision permitting these allowances to become effective the Wisconsin Railroad Commission stated in part as follows:

"It will be seen that the maxima prescribed in the tariff are based upon assumptions which may or may not be correct. In the absence of actual performance of which a study may be made, assumptions must of course be made and the Commission has no criticism of those adopted. But it does feel that soon after the industry has
557 started operation with its own engines another test should be conducted. It should not be necessary to wait until six months has elapsed, as provided in the contract, but should be done for a period of at least two weeks within six or eight weeks after the start of the industry operation. This will give ample opportunity for the industry to get organized and running smoothly" (3882).

The Wisconsin Railroad Commission accepted the allowance and made their order effective September 1, 1928. The tariffs were filed and became effective as indicated, simultaneous filing being made with the Interstate Commerce Commission, which permitted the tariffs to become effective (3882).

A second test was ordered by the Wisconsin Railroad Commission was made in these plants during a two week period in 1928. The results of this test were filed with the Wisconsin Railroad Commission at a hearing held at Madison on October 17, 1929. The results of the test reduced the terminal allowances previously granted from $2.35 per loaded car at Port Edwards to $1.48 per car maximum and from $1.96 per car maximum to $1.26 per car maximum at Nekoosa (3882).

It must be borne in mind that both of these studies were conducted under the provisions of the old formula which consisted of one page of instructions and two forms. Details of distribution of time between interchange, intra-plant, and overhead were left more or

less to the judgment of the engine riders, permitting wide variations in interpretation of conditions and causing a lack of uniformity of application as between plants when the judgment of the engine riders differed (3882).

The witness then quoted from the second order of the Wisconsin Railroad Commission, and described a further study by the Western Trunk Line Terminal Allowance Committee following the Wisconsin Commission's order effective December 1, 1929, resulting in a further hearing November 24, 1930, by the Wisconsin Commission, and establishment of flat allowances per car of $1.42 at Port Edwards and $1.22 at Nekoosa, against an actual cost at Port Edwards of
558 $2.62 to the carriers or $1.55 to the industry and at Nekoosa $2.18 per car to the carriers and $1.48 to the industry (3883–3885).

Flat rates approved by the Wisconsin Commission were filed simultaneously with the Interstate Commerce Commission and became effective at the same time, namely, March 1, 1931 (3885–3886).

The Wisconsin Legislature during the session of 1930 passed a bill which upon signature of the Governor became a law, effective April 23, 1931. This bill reads:

"No payment shall be made by any carrier to an industry for performing any part of the service incident to the origination or determination of carload line haul shipments which the carriers have assumed to perform under the provisions of the Bill of Lading."

The above mentioned law therefore eliminated the payment by the carriers to the plants of any terminal allowance for switching any cars moving in intra-state traffic (3886).

A brief description of a typical day's work on the part of the locomotive may be of some value to the Commission. Aside from the preparatory time of 10 minutes which occurs each morning for the preparation of the engine, the locomotive will place in the round house any equipment standing outside, such as, cranes (3886).

Following that the locomotive will run light to the interchange tracks, classify the cars on the interchange tracks in accordance with the plant requirements, then move a portion of these cars into the yard, leaving them on convenient tracks, where they may be reached with the least amount of effort (3886).

The locomotive will then clear the various platforms of cars which have been unloaded and will then place at such platforms other cars for unloading (3886).

Any loaded cars that are ready are also removed from the platforms and placed on convenient tracks for further handling to the interchanges. After this work is completed the loaded cars will be taken to the interchanges and a second drag of cars taken from the interchanges to various unloading points or loading points in the case of empties (3886–3887).

559 In the interval between movements of different types, the locomotive will handle loaded and empty cars between stock

piles and the log deck for unloading. These movements, of course, are intra-plant movements not chargeable to carrier service and the equipment used is owned by the plant (3887).

Around noon water and coal will be taken and the engine prepared for afternoon service. The lunch period is not paid for; the crew working generally a spread of 10 hours and being paid for 9 hours work (3887).

In the afternoon the service consists principally in the moving of loaded cars from various points in the plant to interchange tracks to make connections with the various trains serving the Mills, while empty plant equipment will be handled to the stock piles for afternoon and evening loading preparatory to the resumption of activities in the mill the following morning (3887).

It must be borne in mind that in accordance with the formula provisions all idle time is chargeable to the plant, inasmuch as it represents a plant disability (3887).

The above description is a general one that applies to both of the above mentioned plants and is a typical picture of the operation of practically all plants performing their own service (3887).

I will not attempt to go into any further details of the terminal allowance formula as I believe the formula is clear and self-explanatory in its provisions.

During May, June, and July 1931, the Milwaukee Road has paid the Nekoosa-Edwards Paper Company $259.86 for interstate shipments only handled by the locomotive at Port Edwards and $104.92 at Nekoosa.

The other plant which is on the Commission's list and which has a terminal allowance is the plant of John Morrell & Company, a packing concern located at Ottumwa, Iowa. The allowance in this plant was prepared in a similar manner to the one previously described and under the provisions of the original Terminal Allowance Formula of the Western Trunk Line Territory (3887).

560 The allowance in question became effective January 10, 1927. This allowance covers all business handled by the plant locomotives, usually two in number (3888).

This plant is served by the Chicago, Burlington & Quincy Railroad, the Chicago, Rock Island & Pacific Railroad, and the Chicago, Milwaukee, St. Paul & Pacific Railroad, the latter handling business to the plant for the Wabash Railroad. Cars are delivered and received on designated interchange tracks in the plant, the allowance in this instance being the actual cost to the plant of performing this service, with a maximum of $2.50 per car (3888).

During the year ending May 31, 1931, the Milwaukee Railroad paid $4,089.37 for the handling of 2,111 cars, or an average cost per car of $1.94, which, it will be noted, is considerably below the maximum provided of $2.50 per car (3888).

Q. I take it that as you described the situation the interstate rates are now applicable from the spots of loading or unloading within

that plant, but that intrastate rates are applicable from your own terminal?

A. I have not—I am not familiar enough with rates to say, but it is my judgment that the rates have not been disturbed in their meaning as to how far our bill of lading provisions carry us, that we must carry those cars right into the final spot. We must place the car for unloading. The law prohibited us from paying the industry anything for the intrastate handling by the plant of any of these cars (3891).

Q. Now, does your own power go in there in reference to intrastate traffic, or do you perform the service—does the plant perform the service without an allowance?

A. The plant performs the service without an allowance on the intrastate business (3891).

There are a good many other things that enter into the determination of whether allowances shall be granted or not, besides cost. The first page of Exhibit No. 264 gives the principal analysis of them (3892). In determining the question of whether or not an allowance is justified, all of the factors in the formula set forth in that exhibit must be considered. Ability of the railroad to
561 operate in the plant would be the principal condition to justify refusal of an allowance. If it is impossible to get into the plant with our power, the plant of necessity must do their own work. I would say that economy is the next principal factor, that is, that it would cost the railroad less if the industry performed the service and were paid for it than if the carrier itself performed the service and incurred the operating expense. Local conditions may bring up other points that will have to be given consideration before the decision is reached (3894). One consideration is that clearances are satisfactory to the men that are doing the work (3895).

Q. Mr. Vivian, if an application is made to the Milwaukee Road, is this a fact, that the Milwaukee Road itself may think that the thing is without merit, and not pass it along, or if it does pass it along, the committee, upon looking into certain general facts, may determine that the case is not one for an allowance, or upon referring it to their counsel, counsel may think it would be illegal, and in any of those events it is denied before the cost of making a cost analysis is incurred. Is that correct (3943)?

A. That is correct.

Q. So after it passes all of those hurdles, then the cost study is made?

A. That is correct (3943).

Q. Well, then, can you say of your own knowledge, Mr. Vivian, with reference to the allowances granted by the Milwaukee Railroad since the setting up of this machinery, that in each instance the Special Committee has determined as to whether or not the industry is willing to permit the Milwaukee Railroad to perform the service (3953)?

A. Yes.

Q. And can you say whether or not in each case the industry has been willing to permit the Milwaukee Railroad to perform the spotting service?

A. Yes.

Q. Well, then, can you say whether or not that would be
562 applied as an absolute requirement, just the same as the requirement that you have previously described, that of being physically possible to perform the service?

A. I would say so (3953).

Four of these twelve allowances which have been granted by the Milwaukee Road were subsequent to the setting up of this machinery and eight of them prior thereto. The allowances at Nekoosa, Port Edwards, Rothschild, and Mosinee were handled under the type of machiner that is set forth in this pamphlet, Exhibit 264 (3954).

Prior to the granting of an allowance, we were performing most of the work for the Sawyer-Goodman Lumber Company at Sagola. We had for the A. O. Smith Corporation, as far as I know, although I am not very well acquainted with that situation. For the American Steel & Wire Company, I believe, we did also, but that has all been discussed in great detail before the Commission, at the time the Commission suspended the tariffs dealing with the terminal allowance. The John Morrell Company plant has had an allowance for a great many years. I am informed that it dates back to approximately 1895, so that I am unable to say, in connection with that plant (3955).

There were cost studies made at all of these industries as to the cost of the plant to operate and the cost to the carrier. Before this special committee machinery was set up, the work was handled more or less individually by the different railroads, reporting direct to the Western Trunk Line Committee (3958).

Three of the cost studies were made under my jurisdiction, one of them was made by the Burlington Railroad, I believe. The other three I handled myself, the Sawyer-Goodman Lumber Company at Sagola, the A. O. Smith Corporation at Milwaukee, and the American Steel & Wire Company at DeKalb. The study at John Morrell was made by the Burlington Railroad (3958).

563 H. M. Eicholtz, Assistant General Manager, Chicago and North Western Railway Company, called as a witness, and having been first duly sworn, testified as follows (Vol. 5, page 4077):

DIRECT EXAMINATION

I am Assistant General Manager, Chicago and North Western Railway Company, Chicago, and have been forty-one years in the operating department progressing through the various grades, superintendent, etc. (4077).

Exhibit No. 268 is a statement of the industries located on the Chicago & North Western Railway which do all or part of their switching. The statement includes the location, kind of power used,

relative amount of switching done and also whether or not allowances are made by the North Western Railway to any of such industries for the work (4082).

There are seven industries, according to this exhibit, which are accorded allowances. Two at Waukegan, Illinois, the American Steel & Wire Company and the Public Service Company; the American Steel & Wire Company at DeKalb and the Keystone Steel & Wire Company at Peoria. The Nekoosa-Edwards Paper Company at Port Edwards, Wisconsin, and at Nekoosa, Wisconsin, and the Marathon Paper Mills Company at Rothschild, Wisconsin. These last three are served by the Milwaukee Railroad. The situation at these three industries has been explained by Witness Vivian for the Milwaukee Road and the situation on the Chicago & North Western is substantially similar (4083).

564 CROSS-EXAMINATION

I believe it is true that with reference to the plants indicated on Exhibit No. 268, where the plant service is performed at the plant with plant power that those industries would prefer to perform their own service rather than, to have the North Western Railway perform it, although I do not understand it arbitrarily in that way. I think in each case we were given an opportunity to perform this service with our own engines, excepting in one case. My remarks will apply with respect to the 7 industries that get an allowance. Now, as regards the others, some of them would like to have an allowance and others have never expressed a desire to have one (p. 4130).

The Milwaukee Coke and Gas Company is one which has applied for an allowance. That application was turned down. As to whether others were turned down, there is a question in my own mind about the Allis-Chalmers plant at Milwaukee. The Medusa-Portland Cement Company had not been paid an allowance. Of course, they are not doing the switching at the present time except their own intraplant switching. I will say that they made an application for an allowance and were turned down. I do not have in mind any others in this particular list that have made application for an allowance.

The Milwaukee Coke and Gas Company was turned down because their plant lay-out was not such that the railroads could economically perform the service. The denial of the Allis-Chalmers
565 Company for an allowance would be the same thing if it came to a decision. To a very great extent it is the curvature of the tracks that constitute disability from the standpoint of operating. One of the important considerations is the matter of plant interference; that is, the industrial operation of the plant would interfere with the operation of the railroad (p. 4131).

It seems to me from what I have heard here that a great many people have not the right conception of what constitutes switching

on a team track. We would much rather switch in a well laid out industry than a team track. When you start switching a team track you are just as liable to switch out every other car and replace it and then possibly pay a claim for damage to the contents because it was not properly put down in the car. If you are careful in switching to avoid those claims it means just that much more care in drilling your cars back in the yard and it means a slow operation. And many times we have switched a team track of 20 or 25 cars and only have taken two empties out, and the same may be true of 5, 6, or 7 other tracks in the same yard. We despise team track when it comes to switching. My answer assumes, of course, that we have no interference from the industry. We do not have any interference with the industry. We do not permit any (4153).

566 We have only one industry on the Chicago & North Western, that I recall, where at the present time we find it necessary to have a locomotive exclusively for industrial plant switching and that plant is the American Can Company at Maywood, Illinois, and you could not say that the engine is employed all of the time in the plant. That plant, as you will note, is served by the Indiana Harbor Belt and the North Western Railway, and the North Western does the switching. Now the use of that engine, the exclusive use of that engine referred to, also includes the transfer service by the Indiana Harbor Belt, and to our own base yard (4135).

There are 22 tracks within that plant, including the leads, and the total trackage is approximately 17,000 feet.

A. It is, in my estimation, a very simple operation in that plant, in handling 90 per cent of the business. Their loading tracks are very conveniently laid out, and you do not have to place every car on a spot. We place cars for loading and also cars for unloading by spotting more than one car at a time (4136).

All of the inbound cars for the American Can Company are brought together in our train yard at Maywood and the switch engine handles the cars to a series of plant tracks from which the same engine makes its distribution of the cars to the spots of loading and unloading. The engine performs the spotting service (4136–7).

They have a Superintendent there who generally directs the important moves, but the engine foreman operating the engine knows just about as much about it as he does (4137).

The Clinton Sugar Refining Company at Clinton, Iowa, requires an exclusive engine at that plant part of the time, similar to that rendered at the American Can Company except that is a four-railroad service (4138).

The American Can Company at Maywood has a locomotive crane that does some emergency railroad switching and practically all of the inter-plant switching (4138).

At Cedar Rapids, we employ one or more engines at the Quaker Oats plant and are paid by the other lines on the basis of so

567 much per car (4139).

Under some orderly program these cars are taken from the series of tracks at the plant gate and distributed by the switch engine in accordance with the plant's instructions and at the convenience of the plant, which is an economical operation for the railroad and involves no idle time for the engine (4142).

I would say the service at the American Can Company's plant is practically the same service performed by the North Western at all other industries along the line which have systems of industrial tracks. I do not think there are very many industries that have better systems of tracks to serve and a few of them may not be so good, but very little difference (4143).

Q. Does the Chicago & North Western Railroad place the car in the plant of the American Can Company at the point where the Can Company wants to, and does, unload the goods from it? (4145).

A. In practically every case. There may be an occasional car that the Can Company will place with their own power.

Q. But you stand willing to place the car where they want it?

A. Yes, sir. And——

Q. And they actually get in some cases placement at the point where they take the goods out?

A. Yes, sir.

Q. Do you put the particular commodities ordinarily at particular points in the plant? Do they have certain places where they unloadetl sheets, for instance? (4145).

A. Yes, sir.

Q. Certain places they unload box material?

A. Yes, sir.

Q. Now what, if anything, is there at the American Can Company's plant that you regard as an exceptional operating practice or different from the customary practice of the railroads?

A. Well, the only thing is their new plant is laid out a little more modern than a good many industries are laid out (4145).

568 Q. Does it cost you more or less, in your opinion, to place—per car—to place cars at the American Can Company's plant than it costs you to place 50 or 100 cars at 50 or 100 separate industries where each takes only one car? (4145).

A. It does not cost as much.

Q. Which does not cost as much?

A. Placing the hundred cars at the American Can Company.

Q. The cost per car is less, in your judgment?

A. Yes, sir.

Q. Than a large number of industries taking one car each?

A. Yes, sir.

Q. Take the situation at Milwaukee on the Milwaukee Coke & Gas Company. Is the Chicago & North Western prepared to place cars at the plant of the Milwaukee Coke & Gas Company at any place accessible to your engines, physically accessible to your engines at which they may wish to unload the car? (4146).

A. We do place some cars, especially on the East Side plant.

Q. Well, I am not saying at that plant—I am saying at that plant do you stand ready and willing, and are you prepared to place a car at any place in that plant for unloading by the consignee that is accessible to your switch engine?

A. Yes, sir.

Q. Do you believe that your practice generally with regard to the methods of handling freight, terminal service given, and so forth, are substantially similar to those of the Chicago, Milwaukee, St. Paul & Pacific Railroad, the Chicago, Burlington & Quincy, or Chicago, Rock Island & Pacific, or is there some broad difference in the practices among the roads?

A. I think they are all practically the same (4146).

569 W. W. WAITES, Superintendent of Terminals of the Southern Railway Company, was called as a witness, and having been first duly sworn, testified as follows (T. Vol. 5, p. 4644):

DIRECT EXAMINATION

I have been Superintendent of Terminals of the Southern Railway Company for 21 years. I am familiar with the location of the plant of the Atlantic Steel Company and the service performed by the Southern in the delivery and receipt of cars to and from this plant. The plant is located within the industrial district of Atlanta, Ga., 2.5 miles east of the Inman yards on the so-called Charlotte Division of the Southern. Cars coming into Atlanta consigned to the steel company arrive at Inman Yards. The trains are broken up and cars taken to North Yards, consolidated into a transfer cut for the steel plant and moved to the plant's interchange track. The distance from Inman Yards to North Yards is 4.5 miles and from North Yards to the plant 2 miles. There are two interchange tracks serving this plant, one inbound and one outbound, owned and maintained by the railroad, each about 1,500 feet in length. The movement between the interchange tracks and spotting points within the plant is performed by the industry. The distance from the interchange tracks to points of placement ranges from 200 feet to ¾ of a mile. Outbound cars are similarly handled except in the reverse direction.

Prior to 1906, when the plant was very small and only a few cars were handled daily, the Southern performed the switching service. Increased business necessitated expanding of the plant and construction of additional tracks, so that at the present time there
570 are 18 separate tracks aggregating 3 miles in length. Interior switching became so heavy that it would take two of the railroad's switching engines practically all day to perform the service. Through agreement with the Atlantic Steel Company, we let them have a small engine for the switching operations, they to man the engine and keep it repaired and bear the entire cost of service of switching in their plant. This enabled the steel company to arrange switching to and out of its plant to suit the convenience of the manufacturing operations.

Since 1906 the plant has expanded to the point where it was required to purchase two camel-back switch engines for use in addition to the engine furnished by the railroad. The engine originally loaned was dismantled and replaced by a smaller one in 1916.

If the Southern Railway had not entered into the agreement and let the steel company handle the switching we could not have continued on account of the puddle mill, the steel mill, and the hoop mill, to which they had tracks which we could not go onto. They used these camel-back engines, this small power, to put the iron and different things around the mill. We could clear up that part of the tracks that could be served by large engines (T. 4644–4647).

CROSS-EXAMINATION

The engine furnished the steel company is used in performing service between the interchange tracks and spotting points within the plant. The camel-back engines owned by the steel company perform the work inside the buildings and other points of loading and unloading which could not be reached by the railroad's engine.

I took the position that it was not up to me to go into the puddle mill and all the tracks, and to spot cars, which
571 would make it impossible for me to do the work without two engines, and hold on to a cut, to push the cars in on the tracks where they wanted them, and I notified them that we would quit doing that. We determined then where our service should end—at the interchange tracks at the plant gates.

As to why we gave them an engine when in our judgment there was no duty upon us to perform any service beyond the interchange point, well, they had so many tracks in there that we could not operate on. They built some tracks themselves which our engines would not operate over, and if I had to hold on to a cut of cars, and reach in and place a car, it was costing me too much money and I complained about it.

As to whether the placing of cars in a position accessible for loading and unloading had to be done at the convenience of the plant, they would keep an engine there pretty well all day, and they were on a ten-hour shift then, and I felt like their business was such—the plant held 300 to 400 cars, there was an interchange service twice a day, with 25 and 50 and up to 60 cars in a cut. I thought it was too much for me to perform, and they agreed to take it over, and in fact, bought two engines of their own.

At the small industries we place the cars where they want them at our convenience and on our own schedules—not dictated by the industry. There are no other industries in the Atlanta district the size of the Atlantic Steel Company. They are all small mills, two or three car industries. The nature of the industrial work and the track layout at the Atlantic Steel Company's plant would delay our power. It would keep two engines out there practically

all day, and sometimes an additional engine would help out,
572 there were so many cars. There are different foremen for each mill, and there are fifteen mills; a conductor has a hard time to satisfy all those fellows. At the small industries we place the cars where they want them. We have a schedule for working those plants daily. The schedule is fixed by both. They have to be ready when the engine comes around to do the work. It would not be possible to enter the plants at our convenience without interfering with industrial operations at the Atlantic Steel Company. We would interfere with their engines. They operate three of four engines in the plant when they are going at full blast. If we were required to serve the industry under those circumstances, it would cause considerable delay and cost to the Southern Railway, and no doubt would cost the industry. Also it would not be possible for me to perform all of the services within the plant on account of the weight of the rail (T. 4647-4652).

We do the work for the other lines in interchange business.

573 E. R. Oliver, Vice President of the Southern Railway Company in charge of traffic, was called as a witness, and having been duly sworn, testified as follows (Vol. 5, p. 4654):

DIRECT EXAMINATION

I heard the testimony of witness Waites pertaining to the agreement reached between the Southern and the Atlantic Steel Company in 1906 and will add to his testimony particularly as it relates to the switch engine furnished that company by the railroad. The Atlantic Steel Company, formerly known as the Atlantic Steel Hoop Company, began operations in a small way many years ago, manufacturing certain iron and steel articles. It was served as all other industries of similar character, but as time went on its business increased to such an extent that it became necessary to enlarge its plant, so that it required more and more switching service. As early as November 1906, it was found that it would be economical from our standpoint to furnish an engine for its exclusive use. A contract to this effect was made, the understanding being that the Atlanta Steel Hoop Company would maintain the engine and pay the crew. Subsequently the industry needed still further service which was furnished by its purchasing and operating two switch engines, but the Southern Ry. engine has continued to be furnished under the old contract and our other service to and from the plant has been confined to simply interchanging loaded and empty cars on certain tracks designated for this purpose. The contract has a cancellation clause, and the industry is required, in the event the cancellation clause is exercised, to return the engine to the railroad in reasonably good condition. It is an unusual arrange-
574 ment, but at the time it was the economical thing for us to do.

The plant has grown and developed to such an extent that it would be impracticable, if not impossible, for us to furnish the switching service now required. The operations within the plant are such that the Southern could not reasonably be required to furnish the expensive service necessary, and I have no hesitation in saying that if the arrangement were considered in the light of present day conditions the switch engine would not be furnished, and the plant would be required to interchange with us on the tracks designated for that purpose. I think this contract ought to be terminated, or, in any event, the engine should not be furnished without special compensation therefor. It may be possible for us to make some arrangement with the industry, now known as the Atlantic Steel Company, under which they will purchase the engine, or pay a reasonable rental for it, but the time is past when we should furnish the engine without special compensation T. (4654–4657).

CROSS-EXAMINATION

The steel plant is served exclusively by the Southern, which also acts as a switching line for other railroads serving the plant. The switch engine described is under the control of the industry and is used indiscriminately in moving the traffic between the interchange tracks and the plant. The Southern is taking the position that its responsibility for delivery to the Steel Company's plant ends at the interchange tracks, and that is the basis on which we are actually working today. We feel that there is a line beyond which an industry cannot require us to go within its yards and do its terminal switching. In many instances the industries do not
575 want us in their yards, because the operation of the switch engine under the supervision of our crews, and under the direction of our Terminal Officials, interferes with the operation within the plant. They prefer to do the service themselves in order that they may direct movement of the cars, and direct the operation of the engine, something that they cannot do if an outside agency comes within their operation, and I think that is one of the prime considerations in many of these industries, performing their own intraplant service. They realize that it is a service which the railroads cannot be required to give. You will understand that there is a substantial amount of intraplant switching, cars are loaded at different warehouses and on different tracks, and frequently the loading of the cars is mixed as to commodities. All that service, if it were performed by the railroads, would be expensive not only to the railroads but to the industries, because we have switching tariffs which would require us to make a charge for each placement or shift of the car, so that the industry itself find it frequently to its advantage to do its own work, just as the Atlantic Steel Company now does its work (4658).

That of course is a very difficult line to draw with any mathematicial or scientific certainty. It is usually a line drawn by the

exercise of good business judgment. An ordinary industry which would require one or two switches a day is one thing and an industry that requires the continuous service of a switch engine is obviously a very different thing. Now, I do not think any industry can require a railroad to keep a switch engine continuously em-
576 ployed within its plant. As I said a moment ago, there are frequently interruptions there which would be quite expensive not only to the railroad but to the industry itself, and many of the industries, you will immediately appreciate, are served by more than one railroad, so if each railroad sent its engines and crews into the industry they would have a rather chaotic conditions with which to contend, so that I should say the line of demarkation is entirely dependent upon the size of the industry and the amount of service it requires, its location with reference to the main line or yard operations, and other considerations, so that each situation must be considered on its merits. Experience has demonstrated that the best way to handle a situation of this kind is for the industry to do its own intraplant work, and to have a designated track where we will make our deliveries and receive outbound loads (4658–4659).

There is a point beyond which we do not think the road haul transportation rate require us to go. It is my judgment that the service would end at the interchange track. We would shove the load on to the interchange track, and would accept the outbound loads on the track designated for that purpose. We have situations where it would be impossible, even if an industry demanded that we perform this service, for us to get our locomotives around the exceedingly sharp curves and over the very light tracks. When we cannot physically operate over the tracks I think it would be improper to give the plant an allowance for performing the service (4660–4661).

No allowance whatever is made to the Gulf States Steel Company, nor is any allowance made to the Atlantic Steel Company. The reasons are substantially the same (4661).

577 No allowance is made to the Sloss-Sheffield Steel & Iron Company at Birmingham. We make deliveries to and receive outbound loads from this plant at Birmingham proper through this company's own railroad, which is known as the Mary Lee Railroad. We operate over the Mary Lee to the interchange tracks. The industry performs the switching between the interchange tracks and points of loading and unloading within its plant. No charge is made by the industry for the use of the Mary Lee tracks. In connecting with the Mary Lee we use a short piece of track owned by the LeHigh Portland Cement Company, for which we pay the cement company 25 cents per loaded car in and the same per empty car out. The reason we go further to serve the Sloss-Sheffield byproducts plant than we do to serve the Atlantic Steel Company is due to the physical location of the interchange tracks. We formerly served the Sloss-Sheffield plant at North Birmingham through a trackage right arrangement with the Louisville & Nashville. This plant was built

during Federal control. At that time it was drawing large quantities of coal from mines served exclusively by the Southern, so the industry entered into an agreement with the L. & N. whereby the industry would pay the L. & N. $1 per car to allow the Southern to reach the industry's interchange tracks over the L. & N. tracks (4663–4665).

As time went on we undertook to relieve the Sloss-Sheffield company by absorbing the charge, but this was not satisfactory because of a lot of traffic short hauled, and we wanted direct entry into the plant or a track within the plant upon which to interchange traffic with the plant. Such an arrangement was finally made with the LeHigh Portland Ctment Co., and we could send our engines from our Woodlawn-Bessemer branch directly to the Mary Lee R. R. and to designated interchange tracks located on that road (4665).

(578) We paid the Louisville & Nashville $1 per car, and now we get in for fifty cents a car with no substantial change in operating expenses (4666).

The consideration for fixing this designated point on the Mary Lee for making deliveries and picking up loads was a physical one pure and simple. No doubt we could have constructed a track to connect our Woodlawn-Bessemer branch industrial spur with the Mary Lee in the North Birmingham section, but that would have been quite an expensive thing to do; we would have had to condemn certain land, and I think we would also have had to cross the Birmingham Belt Railroad. In any event, it was a piece of construction that was rather difficult, and after examination of the whole layout of the ground we decided that the most economical and efficient thing to do was to negotiate the traffic arrangement with the LeHigh Portland Cement Company with which we already had a direct connection (4666).

The Mary Lee Railroad and the Sloss-Sheffield Company are one and the same thing. I don't know personally at the moment just where we do place those cars. I know we get into the plant by using this Lehigh Portland Cement Co.'s connection with our line, between our line and the Sloss-Sheffield Company's railroad. As to whether we spot the cars or not, it may be that we bring a cut of coal cars in there and shove them right down to the coal track. We do not do any interplant switching (4666).

The Sloss-Sheffield Co. frequently gets coal in train load lots, and it is just a question of where you can dispose of it. It may be the economical thing, while we have the engine attached to the cars to shove them down a certain track which they designate for that purpose (4667).

(579) The North Birmingham furnace is closed at the present time. The city furnace, which is not very far from the passenger station, is in operation, and there the Sloss-Sheffield Company performs a great deal of its own service in cross town movements of traffic. For example, they handle the coke from the

by-products plant to the furnace themselves. About all the service that is performed there is the placing of cars for outbound pig iron load. They have long tracks on which these empty cars are placed, and then the pig iron is loaded by magnet cranes. My recollection is that they have their own switch engine there that does whatever intraplant switching necessary; but in any event the cars, the outbound cars, are loaded outside of the furnace proper. I was over there just a few days ago and saw a train load of pig iron being loaded there by these magnet cranes. The cars were placed on a long track adjacent to the pig iron piles and the pig iron is picked up by these magnets and put on the cars and dropped down, and then other cars come right along in *in* order. Of course, that service was an intraplant service which they were performing themselves (4667).

I think at this outbound loading pig iron pile there is a long track there that the cars are shoved into, and they are directly loaded by the industry with these tremendous cranes. Now, the Sloss-Sheffield Company has its own switch engines there, and my impression is that they do the necessary shifting of those cars; but as to the actual operation, in all instances I prefer that our superintendent of terminals give you the information as to that. However, I can say that we make no allowance to the Sloss-Sheffield Co. for any of these services around its plant that it performs (4668).

We make no allowance to the United States Cast Iron Pipe Company at Bessemer, Ala. for the service that they perform (580) within the plant—the interchange service from our track connection to places of loading and unloading. By "intraplant" I have particularly in mind spotting within the plant on line-haul traffic—movements beyond the point where delivery was made to the plant. A plant like the United States Cast Iron Pipe Company has practically no intraplant switching from one location within the plant to another location within the plant, except perhaps for the loading of different kinds of outbound materials; they may have one place for loading part of a car and another place for loading the balance of the car, and that condition frequently occurs in connection with the unloading of inbound cars. Where more than one switch is involved I would classify it as intraplant switching. These big plants have a large number of locations within the plant where they want certain cars at certain times for a certain purpose. It is a very intricate operation in many instances, and we generally refer to that as intraplant switching, switching beyond the service of placing cars on a receiving track or receiving the cars outbound on an additional track. When we place a car on the interchange track and the plant moves it from the interchange track to a place in the plant and spots it, we classify that as intraplant movement because it is a movement beyond the point where delivery was made to the plant. And we feel that our obli-

gation under the line haul rate is terminated upon delivery of cars on the interchange track (4668–4669).

There are many situations where an industry requires only a certain amount of switching; we do out of the line haul rates make deliveries at designated locations. For instance at a cotton mill there is usually a designated spot where we place coal for unloading and we shove it into the certain track designated for the pur-
(581) pose. The usual operation is to take the cars from the yard directly to the industry and in one move place the car at a certain location designated for that kind of traffic. We would probably shove the inbound cotton to the warehouse for that would be unloaded, but that switching would not be done at the plant after the cars were delivered on the interchange (4669–4670).

There are situations where for our own convenience, we have small yards in close proximity to certain industries. I have in mind for instance, the Chevrolet Motor Company plant here in Atlanta. That is somewhat beyond our break-up and classification yard, and we do have a few tracks there in close proximity to the plant where we can store empties for prospective loading, and where we can have them available without the necessity for making any switch moves from Inman Yard, for example; or, if the industry should get more inbound loads than their unloading track can accommodate, they can be placed in close proximity to the industry so that they can subsequently be delivered without any expensive switch moves. We have that situation with some of the cotton mills particularly those that are located in rather detached places. You will understand what I am driving at when I say that each of these situations is usually considered on its merits (4670–4671).

Now, we found that it would be the economical thing for us to do in connection with the Chevrolet Motor Company's plant to have a small yard in close proximity to that plant. There have been times when they loaded fifty to seventy-five or one hundred carloads of automobiles a day, and that required two or three switches a day, by which I mean that empty cars had to be placed morning and afternoon, and in emergencies at noon, so that rather than run
582 those cars from Inman Yard for example, several miles away, we had this little auxiliary yard in close proximity to the plant, which, of course was for our benefit and for our economical operations. The auxiliary yard is in our possession. We do not place the cars in the auxiliary yard upon the request of the Chevrolet people, but do that for our own convenience. On inbound movements, I think under the demurrage tariff if they had more cars than could be spotted in their plant they would be considered as being constructively placed, but I don't think they would be under demurrage unless that condition existed, because they have forty-eight hours in which to unload the cars, and as they come in we take them to this auxiliary yard for our own convenience, and they are then placed at the unloading platform (4671).

After we get them in this auxiliary yard I think the plant would order the cars in as they needed them. That auxiliary yard, is primarily for the accommodation of cars for outbound loading, because the inbound movement to a plant of that kind is usually very much less in numbers of carloads than the outbound movements (4672).

If there is room there the cars are placed immediately at the unloading platform, so that the question of constructive placement would only arise when there was no such room available (4672).

As to the United States Cast Iron Pipe Co. at Bessemer, I know that no allowance is paid for any service that may be performed there (4672).

I am familiar only in a general way with operations of the United States Cast Iron Pipe Co. at Birmingham. No allowances are made to the company either directly or indirectly (4673).

583 The Woodward Iron Company has its own industrial railroad that does the switching in and around its plant and three are one or two other industries on that railroad for which it also performs service, but it receives no allowance whatever from the carrier. Its own industrial railroad performs service from the interchange track connection with our line and the points of placement on the tracks within the plant (4673).

The American Tar Products Company is one of the industries located on the Woodward Iron Company's track. My company makes no allowance whatever to the American Tar Products Company, or to any of the other industries located on the industrial tracks of the Woodward Iron Company. These industrial tracks are known as the Woodward Iron Company road. They serve their own ore mine and furnaces, and I think coal mine (4673).

The Lone Star Cement Company (formerly known as the Alabama Portland Cement Co.), is owned by the International Portland Cement Company, if I recall correctly. For a good many years we did not reach this plant at all, and the traffic we handled from and to it was switch movement by the Louisville & Nashville Railroad. We absorbed the Louisville & Nashville switching charges. For example, their switching charge on outbound cement was two cents per hundred pounds, but there were varying charges on other commodities. The principal traffic that moved over our lines was cement and we paid the Louisville & Nashville Railroad its established charge for making deliveries to us under the usual interchange movement. Several months ago we were able to get into this plant by utilizing the Sloss-Sheffield Company Railroad known as the Mary Lee Railroad, first using the LeHigh Portland Cement Railroad as a connecting line between our Woodlawn-Bessemer Branch and the

584 Mary Lee Railroad. We then got trackage rights over the Mary Lee Railroad down to the point of its connection with the Lone Star Cement Company's plant. This is the same trackage right we have in going to the Sloss-Sheffield plant, and comes under

the same arrangement, only covered by different contracts. In getting to the Sloss-Sheffield by products plant we only had to utilize the Lehigh Portland Cement Company's connection, but in getting to the Lone Star Cement Company's plant, we had to use the LeHigh Portland Cement Company's connection with the Mary Lee Railroad, and then the Mary Lee in connecting with the tracks of the Lone Star Cement Company. For that use of the Mary Lee Railroad we pay $1.50 per car to its owners—the Sloss-Sheffield Company. We make no allowance whatever to the Lone Star Portland Cement Company (4674).

As I said, our former method of handling traffic from and to this Line Star plant was by the switching service of the Louisville & Nashville R. R. We could not utilize the Mary Lee Railroad at that time because the Mary Lee Railroad being a non common carrier, we felt that we had to do business with the Louisville & Nashville Railroad; but we were finally able to get our direct service to the plant by this trackage right arrangement, and in doing that we saved ourselves a substantial sum in operating expenses (4675).

We pay the LeHigh Cement Company 50 cents per loaded car for operating cars over a portion of their line in order to reach the Mary Lee Railroad. That would make our total cost then $1.50 to the Mary Lee and 50 cents to the Lehigh Company, or $2.00 per car. Prior to that time when we made this arrangement, the only way we could get in there was by paying the Louisville & Nashville two cents per hundred pounds on cement, and that averaged from $10 to $16 per car (4675).

585 At that time we were in doubt about our ability to absorb a switching charge of a non common carrier railroad. We don't provide for the payment of this $1.50 in our tariff at all. We simply say in our tariff that we reach the Lone Star Cement Company's plant with out rails, and this arrangement with the Sloss-Sheffield Company for the of the Mary Lee Railroad is covered by a private operating contract. We send our locomotives and crews over the Mary Lee down to the cement plant in performing the service; in other words, by reason of these contracts which we have been able to negotiate, the Lone Star Cement Co. plant is just as much on our rails as is any other plant in the Birmingham district. I have reached the conclusion that I do not believe you can absorb the switching charge of a non common carrier railroad on the business of the industry that owns the railroad. We have been very careful not to do anything of that kind. If you made the absorption you would have to publish it (4677).

We make the payment of $1.50 a car to the owners of the Mary Lee Railroad, namely, the Sloss-Sheffield Steel & Iron Company, for the trackage right that it gives us, under which we are able to go over that railroad to a direct connection with the Lone Star Cement Company's track. We make no payment to the Lehigh Portland Cement Company on its own traffic. It moves its own

traffic down and places it to us at the junction between our Woodlawn-Bessemer branch and its own railroad. We do use the Lehigh Portland Cement Company's road in making a connection with the Mary Lee for which we pay the Lehigh Portland Cement Company 50 cents per car. Our engines and cars run over these connecting tracks from our Woodlawn Bessemer Branch to the Mary Lee. Now, for that trackage right we pay the Lehigh Portland Cement Co. 50 cents per car. Now, as we continue on down the Mary
586 Lee railroad to the plant of the Lone Star Cement Company with our engines and crews and our cars, we pay the owners of the Mary Lee Railroad, the Sloss-Sheffield Company, $1.50 a car for that right.

587 H. H. KNIGHT, was called as a witness, and having been duly sworn, testified as follows (Vol. 5, p. 4711):

DIRECT EXAMINATION

I am Traffic Manager of the Gulf States Steel Company. Our office is in Birmingham, but our plant is at Alabama City, Ala. I am familiar with the complaint filed by the Gulf States Steel Company against the Director General of Railroads and the Louisville & Nashville Railroad in December 1919. And also with the decision of the Commission in the disposition of that case, 66 I. C. C. 255. There have been no material changes in the operations and the industrial tracks at our plant since the complaint was filed and the case decided. The plant has been considerably enlarged since then, and we have better tracks now than we had then. None of the trunk line carriers that serve our plant enter in upon the industrial tracks and do the spotting service. We would have them do that if we could. As to whether we would prefer to have them enter in upon our tracks and perform the service, on the inbound material if they could make the one spot we would, and come and get the outbound loads and take them out. By that I mean make the delivery of the raw material to the storehouse. I don't see any reason why they could not do that as a physical matter. As to the outbound material they would have to go over to our warehouses where it is loaded, and our mills. The carriers could not pick them up in one movement because there are five or six mills. They would have to assemble those cars somewhere on our industrial tracks.
That work is performed by our own power and our own tracks
588 now. We assemble the cars from the respective places where they are loaded, and shove them out onto the carrier's track, at the gate of our plant. We do not receive any allowances now from any of the railroads. The three railroads which serve us, probably could not as a practical operating matter enter in and upon our industrial tracks and give us the service that we need at the industry without interfering with us (4711–4713).

In the handling of inbound traffic to our plant the industrial operation requires that our inbound material be placed at a particular location at a time that will meet the convenience of the industry. It could not be shoved in at any time the railroad cared to shove it in on this property (4713).

We have about 100 cars of coal, ore, and limestone a day. If the carriers undertook to deliver all that stuff that comes in there, and take out all that we ship, it would be necessary for them to have a couple of engines there all the time (4714).

When the cars are placed on the interchange track which serves our plant, our own engine goes out and picks up the cars we want and leaves the rest of them there. It is just a continuous performance. They get 20 cars of ore and they take them and dump them. Of course we want the inbound materials to be spotted when it is most convenient for the plant to use them. It is largely a matter of plant convenience in the spotting of these large plants (4714–4715).

The situation is the same today as at the time of the decision reported at page 259:

"Complainants are willing to have defendants make these placements only on condition that defendants accept directions from the plant management as to when and how to make them to suit the convenience of the plant" (4715).

589 Louisville & Nashville Railroad Company

W. B. PORTER, Inspector of Transportation, Louisville & Nashville Railroad Company, was called and having been first duly sworn, testified as follows (Vol. 5, p. 4787):

DIRECT EXAMINATION

I am Inspector of Transportation, Louisville & Nashville Railroad Company. The Louisville & Nashville received a letter from the Commission asking for additional information in respect of terminal and switching services performed at certain specified plants. I am appearing here as an operating witness to provide the information desired. I testified previously at the Cincinnati hearing and covered seven of the industries listed in the Commission's letter. The first industry on that list is the North Birmingham plant of the Sloss Sheffield Steel & Iron Company located at Boyles, Alabama.

A blue-print map showing the situation at that plant was received in evidence and marked Exhibit A–6.

The tracks shown in red on that print are owned and maintained by the Louisville & Nashville. Those shown in yellow are maintained by the industry. We deliver to the industry on the track marked A, and they deliver to us ordinarily at that point. They also deliver and receive cars at the point marked B on that track. Their engine does all the intraplant switching. We perform no

other service for this plant except to place cars on designated tracks (T. 4787–4788).

590 CROSS-EXAMINATION

To my knowledge the Louisville & Nashville has never performed the spotting service at this plant. We make the original placement for some industries in the Birmingham district where they have no locomotives of their own. We assume that to be our duty in making delivery of the traffic. It was always my understanding that when we made the original placement at the extensive Sloss Sheffield plant, our duty to that industry ceased. I don't understand we are required to go in there and do intraplant switching for that industry. We merely interchange cars on designated interchange tracks, and they perform their own service. I presume that they would have a right to ask us to place certain cars at a certain point, i. e., a car of coal at one point, and a car of raw material at another point. However, I believe that they do not want our engines in there. Some people in other territories don't take that position, but that is our position (T. 4788–4789).

Re: Georgia Marble Company

DIRECT EXAMINATION

The situation at the Georgia Marble Company at Ball Ground, Georgia, was covered in my testimony given at the Cincinnati hearing.

CROSS-EXAMINATION

The Georgia Marble Company is a small industry with two
591 tracks and is switched by our local freight trains. We do all the work there; in other words, that plant is switched as any other small industry on our line. We do not assign a locomotive at the plant. A blue-print map of the plant layout was furnished at the prior hearing and marked Exhibit 211.

Re: Kelly Car & Foundry Company

DIRECT EXAMINATION

The situation at the Kelly Car & Foundry Company at Anniston, Alabama, was also covered by me at the Cincinnati hearing.

A blue-print map of the track layout at this plant was received in evidence at that hearing and marked Exhibit No. 221. This industry maintains its own industrial engine and performs all its intraplant switching except on coal, which we place for them. This is done for our own convenience, because the coal track leads out to our main line and we don't want their engines on our main line.

CROSS-EXAMINATION

We pay no allowance to this industry for performing their own spotting service (T. 4789–4791).

Re: New Jellico Coal Company

DIRECT EXAMINATION

The situation at the New Jellico Coal Company at Morley, Tennessee, was covered by my Cincinnati testimony, and by Exhibit No. 216 introduced in connection therewith. This, too, is a small coal mining industry. All switching service at this plant is
592 performed by the Louisville & Nashville and consists merely of placing empty cars on one track and picking up loads on another track.

CROSS-EXAMINATION

We perform the same service at this plant as we perform for any coal mine.

Re: Rockdale Iron Company

DIRECT EXAMINATION

The situation at the Rockdale Iron Company, Rockdale, Tennessee, was covered by my testimony and by Exhibit No. 217 at the Cincinnati hearing. We perform the spotting service on all incoming traffic. We also perform some intraplant switching for which there is a tariff charge of $3.15. This service consists of taking cars of pig iron from the industries loading track to their scales and setting them over a few feet on another track. The industry owns some cars used in this intraplant switching.

CROSS-EXAMINATION

The industry maintains five separate tracks for loading or unloading. We spot cars in only about two or three places. They do some switching with their own power. The spotting service at this plant is a very simple operation because of the short distance the plant is located from our main line. It is a more simple operation at the Rockdale plant than at many plants at Birmingham. The switching at this plant is performed without any plant inter-
593 ference, and is equivalent to the receipt and delivery of cars on interchange tracks at other plants in the Birmingham district. The tracks of the plant are always open and ready to receive any traffic for the industry at the time our local trains reach there. Inbound cars of coke, iron ore, phosphate rock, limestone, gravel, etc., are largely placed on trestles for unloading. Inbound coal is not placed on trestles but just shoved in on another track (T.

4791–4796). When the blast furnace is operating, switching is done by an engine from the L. & N. yard at Mt. Pleasant, a few miles north of Rockdale.

Re: Saginaw Lumber Company

DIRECT EXAMINATION

The situation at the Saginaw Lumber Company, Saginaw, Alabama, plant was covered by my testimony and by Exhibit No. 208 at the Cincinnati hearing. My previous testimony and Exhibit No. 210 also covered the situation at the plant of the Southern Car & Manufacturing Company, Birmingham, Alabama.

Re: United States Pipe & Foundry Company

DIRECT EXAMINATION

The situation at the plant of the United States Pipe & Foundry Company, North Birmingham, Alabama, was covered by my Cincinnati presentation and by Exhibit No. 209 there introduced.

CROSS-EXAMINATION

We do not perform the spotting service at this plant. Our
594 service ceases at the interchange tracks within the plant, shown on Exhibit No. 209 as C and D.

The industry does all the placing of cars for loading and unloading within the plant.

In the report of the Commission in United States Pipe & Foundry Co. v. Director General, 57 I. C. C. 442, at page 446 as follows: "It is found that the plant at Birmingham of the United States Pipe & Foundry Company is served by the Louisville & Nashville Railroad Company (and others) and that the switching and spotting is performed by the carriers without charging additional line-haul rate", is not in accordance with our instructions—I was referring to the Dimmitt Pipe Works.

Perhaps our company did spot cars in that plant's infancy, but after it grew to good sized proportions they furnished their own locomotive (T. 4796–4798).

Re: Lone Star Cement Company

DIRECT EXAMINATION

A blue-print map showing the situation at the plant of the Lone Star Cement Company, Birmingham, Alabama, formerly known as the Alabama Portland Cement Company was received in evidence and marked Exhibit A–7. The industrial tracks are indicated by yellow lines and the Louisville & Nashville tracks by red lines. The Louisville & Nashville performs the spotting service at this plant.

595 CROSS-EXAMINATION

The traffic we deliver to this plant is delivered at various points, but ordinarily it is placed by our yard engines at only two points. Outbound material consists of cement and inbound of the various materials used in the manufacture of cement. This material is spotted directly, and there is no interruption in that movement. It is not necessary to assign a switch engine at this plant for that service. We have free access to and from the plant at all times. We are the only trunk line that directly serves this plant. I believe the industry maintains an engine of its own but am not sure about that. We have track connections with the Lehigh Portland Cement Company's track and with the tracks of the Alabama By-Products Corporation. I believe the Southern reaches this plant via the Mary Lee R. R. The Lehigh Portland Cement Company is just across the carrier's main line from the Lone Star plant.

Re: Alabama By-Products Corporation

DIRECT EXAMINATION

A blue-print map showing the situation at the plant of the Alabama By-Products Corporation, Birmingham, Alabama, was received in evidence and marked Exhibit A–8. The Louisville & Nashville switch and road engines place carload traffic for this plant on tracks designated on the map as locations A and B, from which it is handled by locomotives of the industry. The railroad also
596 makes placement of empty coke cars at location C and tank and box cars at location B. All intraplant switching is done by the industrial engine.

CROSS-EXAMINATION

Inbound traffic consists of coke and coal, and outbound traffic of acids and various other products. I do not know the number of points of loading or unloading at this plant, but there are a great many. We place cars only at the points A, B, and C, indicated on the print. The rest is done by the industry. The Louisville & Nashville gave permission to the Lehigh Portland Cement Company to build an underpass under its road. The Alabama By-Products plant is not reached by other carriers under any agreement with the Louisville & Nashville. These carriers probably reach this plant through the Lehigh Portland Cement Company's underpass.

In this contract as between the Lehigh Portland Cement Company and the Louisville & Nashville Railroad Company there is some provision that relates to the extent to which that underpass might be used by the Lehigh Portland Cement Company and for what traffic it might be used, but I would not imagine that the contract would specify what roads could use it and what could not. I have never seen the contract and am not familiar with it, but I know they built an under-

pass on our line. That is shown under the Lehigh Portland Cement Company blue-print.

597 By Mr. HAGERTY:

Q. I have here what purports to be an agreement between the Louisville & Nashville Railroad Company and the Lehigh Portland Cement Company, and in Section 6 it states: "It is further understood and agreed that no railroad company or common carrier shall be permitted to operate over or across any of the property of the said Louisville & Nashville Railroad Company for the purpose of giving any service to any other plant than that of the Cement Company, except, however, the rights given the Alabama Company as hereinbefore provided for." If there is no objection on your part, we can identify that, or a copy of it, and I would like to put it into the record. Does that cover the construction of the underpass?

A. I think it relates to the construction of the underpass.

We deliver to the Lehigh Portland Cement Company railroad on interchange tracks, and that company performs
598 the spotting with its own power. We have no physical connection with any other industries. In ordinary times we receive 15 to 20 cars a day from the Lehigh Portland Cement Company (T. 4805).

REDIRECT EXAMINATION

W. P. PORTER (continuing). There seems to be a conflict, as I understood counsel, between my statements and the statement of the Southern Railway people as to the intraplant switching of the Lone Star Cement Company. My recollection was that they had discontinued the operation of their engine, and I have confirmed my memory on it. Their engine at present is laid up and not being used. They discontinued it some time within the past year, so that at present we are making placements for them. I want to explain that by "switching" I mean first placement, and only placement. Therefore, when I say "switch a plant" with our engine I mean that we make one spotting of an inbound load and pick up an outbound load or empty (T. 4798–4806).

RECROSS-EXAMINATION

The Louisville & Nashville makes one placement for all industries. When we place cars on the interchange track, we construe that as placement. Where they do their intraplant switching, and they agree on a point within the plan for us to place the cars, we place them at that point, and then they will switch from point to
599 point within the plant. At the time the Lone Star Cement Company's locomotive was being operated that company did the principal part of the spotting within this plant, for the L. & N. as well as the Southern. Under normal business conditions the industry's engine performs that service as a matter of preference.

Normal conditions would involve intraplant movement, spotting from one place to another within the plant. They might load a car partially at one place and move it to another place to finish loading. We would not be obligated to make a move of that kind. Under present conditions, if they wanted to load a car at two places, they would have to truck it.

In normal business times the Lone Star Cement Company will tell the Louisville & Nashville Railroad where it wants its inbound traffic delivered to, and they have told us they would take delivery on the interchange track.

If they should change that order and say, "We want you to spot the cars on our tracks in locations for loading and unloading", we would do it. That is what we are doing now.

They prefer to perform their own service rather than have us do it, in normal times, because it is cheaper for them and more satisfactory.

600 When I speak of "original placement", I have in mind direct movement of the car from our track to the tracks of the industry at a location for loading or unloading. The industry prefers to perform that service, in normal times, and that is the reason we don't perform it.

When I say it would be cheaper for the industry to perform it themselves than if we did it, I meant for the second or third or fourth movement. The large plants sometimes have their own equipment and move material from one part of the yards to the other. They have smaller engines. They pay their crews less than the railroads. They can perform the service cheaper than we can perform it and charge it to them. It at least costs the industry something to perform for themselves spotting service, which they would not have to perform if the Louisville & Nashville Railroad did it—we would, of course, be relieved of that much of our obligation. That is a matter of preference with them—we stand ready and willing to do it.

RE-REDIRECT EXAMINATION

The service from the interchange track is not necessarily intraplant service. If they have their own engine, they naturally do not want us in there in the way. They will designate where they want us to spot the cars, and that is what we do. If they have no switching engine, then we would place the car where they would reasonably ask us to place it (T. 4806–4809).

601 L. L. DRESCHER was called as a witness and, having been duly sworn, testified as follows (Vol. 5, p. 4810):

DIRECT EXAMINATION

I reside at Louisville, Ky., and am employed by the Louisville & Nashville Railroad Company as assistant to the vice president in

charge of traffic. In the case of some industries such as at the Sloss-Sheffield plant at Birmingham, for example, the Louisville & Nashville does not enter in or on the industrial tracks with its own power to perform service. Nor does it assume the cost of such service which is performed by the industry; that service being the movement of the car from the interchange track connection with the Louisville & Nashville and the location for loading or unloading on industrial tracks within the plant. As to just what conditions the L. & N. have applied in determining whether or not they will perform the spotting service, or assume the cost thereof, or refuse to do so, I think that question is answered by the industry itself when it acquires its own switching facilities which it uses for good business reasons sufficient for itself. These might be various, such as, for example, they may ascertain that they have a great deal of intraplant switching service to perform. They may want their traffic at such time or at such times as would possibly best suit their own convenience, and at times when they could not rely upon any road haul carrier to serve them. Under those circumstances as I understand it, the industry acquires its own switching facilities, and when they do they make arrangements with the line haul carrier (the Louisville & Nashville in the case of the road for which I am testifying) and decide upon a certain point of interchange as between the plant itself and the road haul carrier. Under those circumstances when we place an inbound car at that designated point of interchange we feel
602 that we have made the placement that the line haul rate contemplates (4810–4811).

As I understand rate matters, line haul rates include one placement of a car, i. e., if you have an inbound car it includes placement at the consignee's plant or place of delivery. Now if for any special reason or any special circumstances in the case of the Sloss-Sheffield Company, for example, their power should fail them, and it would be necessary for us to keep that plant running, or perhaps for other reasons, to place a car I guess they would do it (4812).

The statement of the witness for the Sloss-Sheffield Company that they would be glad to have the railroad perform that service if they would give them the service they wanted—I think that (service) is the fly in the ointment. I think that is the one thing that determines a plant in acquiring its own facilities. The only condition under which I can conceive at the moment that we would not perform the service of one placement at a location for loading or unloading would be that it would be unsafe for us to enter upon or take our power into that particular track or upon that particular track, or perhaps the layout of the plant would be so very unusual or complicated and intricate that we would not be required to do it. It would be a peculiar situation, peculiar to that particular industry (4812).

I have in mind the matter of the interference, and the physical conditions of the track, and the buildings within the plant enclosure, and things of that kind. These things would have to be taken into

consideration. So far as I know in the case of all industries connected with the Louisville & Nashville that have their own plant switching facilities, they desire to do their own switching service, and we are not called on to perform the service that you describe.

603 With reference to there having been a fixed policy among the southern lines as to making allowances to industries that do their own spotting service, so far as I know they do not make any allowances to industries that do their own spotting service. That is certainly true with respect to the Louisville & Nashville. There is not an industry to which we make an allowance for performing the service, and so far as I know that is the policy generally with southern carriers (4813).

Where our company is getting a switching charge for service within the Birmingham switching district, that charge generally includes spotting of the car in the industry for loading and unloading. I want to qualify that in the case of those industries which have their own plant switching facilities, in which instances it includes a placement of the car at a designated point of interchange between the railroad and the industry, established by mutual agreement between the railroad and the industry (4814).

The switching charge on cars handled by the Louisville & Nashville and the switching carrier would include the delivery to the designated point of interchange between the L. & N. and the Sloss-Sheffield Company. They might actually use that car at some point or spot within their plant somewhat removed from that point of interchange (4815).

It would be at the point where the Sloss-Sheffield Company wished to have the L. & N. railroad deliver the car (4815).

It is my idea that the carrier's obligation is to make placement—one placement at some reasonable point and in giving the illustration about a track that might not be in good condition, it is my idea to submit that as an example of some place that would not be a reasonable place. I am just giving that as an illustration of a case which would not be reasonable (4815).

The L. & N. has no settled policy as to just how far from a given point within a municipality our terminal limits will extend.

604 That depends upon the facts and circumstances, and what has been considered good railroad practice with respect to the particular point. In other words, we might go a mile, we might go two miles, we might go three miles, and still stay within reasonable limits. Take Louisville for instance, with which point I am more familiar than any other one point; the switching limits of that city extend some eight or ten miles in an easterly and westerly direction from our South Louisville break-up yards. In that particular situation we perhaps would have some plants where we make interior delivery within the plant area, and other plants where we would merely place cars on interchange tracks outside of the plant area, but in both cases we would be fulfilling our duty and obligation under the line-haul rate. So the fact of placement either on an

interchange track or on an interior track within the plant area I do not think changes our obligation under the line haul rates. Our idea is, when we make the placement at the designated point of interchange, we have discharged our obligations under the line haul rate. We are of course presumed to use good judgment in the operation of our railroad. As I stated at the outset, we understand we are obligated to make one placement under our line haul rate. That may be at a specific unloading point within that plant, or it may be at a designated point of interchange with that plant. Whether it be either one, we feel, after we have placed the car there, we have discharged or complied with our obligation. The fact that we actually place our cars for loading and unloading within the plant area does not mean that we are favoring or giving the industry preferential treatment as against some plant where we merely deliver and take cars at the interchange (4817).

We feel that it is our obligation to place a car in an accessible position for unloading or loading either within or without the plant enclosure, providing there is no interference with our performing that service, and providing there are no complications
605 and if the plant wants it there. And if it has not its own switching facility, and put us on notice as doing that service itself.

If a plant has its own power and elects to take it (the car) on an interchange track, that is where we will place it. In either case our obligation is fulfilled (4818).

I have never heard a plant switching facility referred to as an obstacle or interference.

The reason why we don't go in on the track and perform the spotting service at some of these industrial plants is not disability on the part of the L. & N. in a sense, but because of some act of the industry. That act may be a failure of the industry to keep its tracks in condition to accommodate the locomotives and won't let us come in. We might have an agreement which would specify that we should place cars at some designated interchange track. If a plant were complicated or there is involved a number of tracks within the plant, it may well be that we would not feel it our obligation to spot the various spotting points in the plant. Respecting our limits I think it might be a matter for determination of each individual industry (4820).

606 E. A. TEED was called as a witness, and having been duly sworn, testified as follows (Vol. 5, p. 4832):

DIRECT EXAMINATION

I have been superintendent of terminals with the St. Louis-San Francisco Railway Company, at Birmingham, Ala., since February 1929, and have been familiar with the Birmingham terminals of this line since 1926. I do not know why the Frisco does not go on

the tracks of the United States Cast Iron Pipe Company, and spot the cars in position accessible for loading and unloading at the respective locations in the industrial plant, except that that was the arrangement when I took charge of the terminal. I do not know how many points for loading and unloading there are, nor how many engines the plant operates in performing the service beyond the scale in spotting the cars for loading and unloading. I do not know of any transportation reasons, physical or otherwise, that would prevent the St. Louis-San Francisco Railway from entering upon those industrial tracks, and placing the cars at the respective location for loading and unloading. All I know is that the industry wants the cars at the scale and we place them there (4836).

CROSS-EXAMINATION

I do not know why the St. Louis-San Francisco does not with its own power enter upon the tracks of the Woodward Iron Company and perform the spotting service at the locations, where the traffic is loaded or unloaded. This arrangement was in effect when I took charge of the terminal and I have continued the arrangement. I do not know of any transportation considerations, physical or otherwise that would prevent the entry of their locomotives on the tracks to perform that service.

607 Their track is a designated interchange track. The industry wants the traffic there and we leave it there. It is my understanding that when we place cars on the interchange track we have effected delivery. We give no allowances in the Birmingham district that I know of—none in that part of the country (4839).

608 ROBERT N. NASH, freight traffic manager, St. Louis-San Francisco Railway Company, was called as a witness, and, having been first duly sworn, testified as follows (Vol. 5, p. 4840):

DIRECT EXAMINATION

The only reason, in my opinion, why the St. Louis-San Francisco does not perform the spotting at the United States Cast Iron Company and the Woodward Iron Company plants is that these companies prefer to do this work themselves. We would perform this service if requested to, provided that their industrial tracks are suitable physically for our locomotives, and I think they are. However, they prefer that we simply place the cars at a point available for their locomotives and they place them at their loading or unloading docks themselves. We consider it our obligation and we think we have complied with our obligation with respect to a loaded car for an industry having a private sidetrack, when we place that car at a point available for unloading. Of course, like any other practice there are certain reasonable limits which we might be called

upon to exercise, where the track situation within a plant was complicated, but so far as I know there is no place on our line where we would not perform the spotting service if called upon to do so (4841).

We interchange traffic with the Birmingham Southern, I think it is in the East Thomas Yard and we have joint through rates with that company to and from Ensley, at which point I understand, or Fairfield rather, the American Steel & Wire Company's plant is located. The situation in the Birmingham district is a little different from a good many industrial districts. We still maintain, and other roads the same, several stations within that district located within
609 the corporate limits of Birmingham and in exchanging freight with connections we don't work on a switching charge basis in many cases. For instance, the United States Cast Iron Pipe & Foundry Company is not located, so far as the Frisco is concerned, at Birmingham, but at Bessemer, although most of the freight interchanged is at East Thomas Yard and we receive a division of the freight rate and not a switching charge on that traffic. It is true that we could physically interchange with the Southern, Birmingham Southern and the Louisville & Nashville at Bessemer for the pipe company, but as a practical matter that is not done. The Birmingham Southern operates through Ensley and Fairfield and on all the business handled to and from those towns the interchange is at the East Thomas Yard in Birmingham and that road receives a division of the through rates. The Birmingham Southern performs the spotting service at the American Steel & Wire Company's plant. I assume the division would include the spotting of cars at the respective locations within that plant. The interchange made with the Birmingham Southern and the two other lines named is more a question of the regular scheduled handling of business than a practical operating situation. In other words, we don't keep a switch engine out at Bessemer to handle this traffic regularly. It is handled by a road switcher which operates on a regular schedule out of the East Thomas Yard. The service is such that it is better to operate it that way. That is because the Birmingham Southern is there with switching service to take traffic from our road (4841–4842).

A letter from the Lehigh Portland Cement Company addressed to the Commission explaining the operation of that company's railroad in connection with the connecting trunk-line carriers was received in evidence and marked "Exhibit A–15" (4843).

610 F. A. KEY, Jr., Traffic Manager, Louisiana and Arkansas Ry. Co., was called as a witness and having been first duly sworn, testified as follows (T. Vol. 5, p. 4952):

DIRECT EXAMINATION

I am Traffic Manager of the Louisiana and Arkansas Railway Company with headquarters at Shreveport, La. I have been

employed in the capacity of General Freight Agent and subsequently as Traffic Manager, since August 1926. In connection with my work, I have charge of the publication of all rate tariffs, including those having to do with switching allowances at stations which we serve. In the instant case, namely, allowances to the Fisher Lumber Corporation, I find that our records indicate that the Fish-Hurd Lumber Company established a mill in the vicinity of our line at Ferriday, La., during 1924, 1925. At the time the mill was constructed we had no station at Ferriday, and the nearest approach to the town of Ferriday was through Concordia, La., our interchange point with the Missouri Pacific Railroad. The Fisher-Hurd Lumber Company indicated a desire to draw log tonnage from points on the Louisiana and Arkansas Railway for handling at its new mill, and after some negotiation, our people decided to establish a station at Ferriday, approximately one-half mile west of the station formerly known as Concordia Junction. At this station Ferriday, a spur track was constructed to serve the new plant of the Fisher-Hurd Lumber Company. Prior to this action the Missouri Pacific Railroad had secured authority from the Commission and published switching allowances on both outbound lumber and inbound logs, and it was obvious that we could not hope to
611 secure any business outbound from this mill unless we could arrange satisfactory switching arrangements not to conflict with the mill's own switching arrangements or make a similar allowance to that afforded the mill by the Missouri Pacific Railway. We, accordingly, filed an application with the Interstate Commerce Commission under date of August 26, 1925, seeking authority under the terms of paragraph 13, section 15 of the Act to regulate commerce, and under the Commission's fourth supplemental order in the tap line case, I. & S. Docket 11, January 29, 1915, to publish an allowance of $3 per car on shipments of lumber and other forest products, carloads, switched by the locomotives of the Fisher-Hurd Lumber Company from their mills situated in the Ferriday Yard limits, to the connection of their spur track with the line of the Louisiana and Arkansas Railway, a distance of approximately 1,950 feet, also an allowance of $2 per car on shipments of rough material, including logs, carloads, moving from points on the Louisiana and Arkansas Railway to the mill of the Fisher-Hurd Lumber Company, where such cars were handled by the locomotives of the Fisher-Hurd Lumber Company (T. 4952–4953).

In response to this application under date of October 6, 1925, approved the allowances, and the allowances accordingly published effective November 20, 1925, as Item 86 of Supplement 2, to Louisiana and Arkansas Tariff I. C. C. No. 1267. Under date of November 8, 1928, the Commission was asked for authority to change this publication to provide for the allowances to be made to the Fisher Lumber Corporation, which concern had succeeded the Fisher-Hurd Lum-

ber Company in the latter part of 1928. In addition, authority was sought to make the outbound allowance apply on wood
612 ashes switched from the plant of the Fisher Lumber Corporation to our connection. Authority was furnished under date of November 12, 1928, both with respect to the allowance on ashes and to cover the change form the Fisher-Hurd Lumber Company to the Fisher Lumber Corporation.

Effective November 1, 1928, it appears that the Missouri Pacific Railroad reduced the allowance on inbound shipments of logs and rough materials from $2 per car to $1 per car, and in order to keep the allowance on a parity, we, accordingly, asked the Commission authority under date of November 16, 1928, to make a similar reduction and were advised by the Commission that inasmuch as the allowance which we desired to publish was a less amount per car than that specifically authorized theretofore, we were at liberty to make the reduction without further action by the Commission, unless such publication was attacked by formal complaint. Publication of reduced allowance was made effective December 20, 1928, as Item 125-B, Supplement No. 6 to Louisiana and Arkansas Tariff I. C. C. No. 1297. These allowances, namely $3 per car on outbound shipments of lumber and $1 per car on inbound shipments of logs and articles grouped with these allowances, have continued in effect, and are now published in the current issue of freight tariff 1789 series (T. A. 467-A 471).

CROSS-EXAMINATION

I have no knowledge with respect to any consideration given the question of determining as a physical matter whether or not the Louisiana and Arkansas Railroad Company could enter
613 upon the industrial tracks of the lumber company at the time the publication was made. The fact that the Missouri Pacific was making an allowance was a factor in causing us to seek authority to grant the same, although other factors were no doubt taken into consideration. I am sure in applying to the Commission it was assumed that the service of placing the cars in an accessible position to load and unload on the industrial tracks was given consideration and was a service the Louisiana and Arkansas owed the industry. This was not shown in the application to the Commission for an allowance, which was based largely on the Commission's findings and orders in I. & S. No. 11 (T. 4954-4955).

614 J. L. SHEPHERD, General Freight Agent of the Illinois Central, was called as a witness, having been first duly sworn, testified as follows (Vol. 5, p. 5230).

DIRECT EXAMINATION

I have been General Freight Agent of the system of the Illinois Central System since February 20, 1932. Prior to that time I was

General Freight Agent of the Southern Lines from June 1, 1926. Prior to that time I was Assistant General Freight Agent of the Southern Lines. In a general way, I am familiar with the circumstances under which the allowance is paid by the Illinois Central to the Standard Oil Company, Baton Rouge, for the industrial service performed on its tracks. About all I know about it is what is in records and what I got from contact with other offices and by actually publishing the tariff (T. 5230–5231).

If it happened that the Illinois Central elected to perform the service at the Baton Rouge Plant or at the Destreham Plant, and in the course of its performance it accounted the same kind of delays or circumstances that caused the same use of time and determined in the cost study—that is, from factors that should be eliminated and charged to the industry—our obligation would be to make the delivery to the industry. Whatever obstacles we incurred in making that delivery would be our disability which we would have to stand.

As to whether those so-called obstacles or disabilities were regarded as things that the plant was responsible for, I did not intend to make the answer that we would treat such conditions as a railroad disability. The cost study is a study predicated
615 upon a performance in the Standard Oil Company Plant taking into account their operations, and naturally they charged to the Oil Company those things which were properly chargeable under our method of operation, but if the plants were not doing that and the railroad was called upon to make the delivery and we would encounter certain obstacles regardless of what those would be, that would be our disability and we would have to stand it.

When you go in to switch an industry, there may be some time lost there on the spot, making arrangements for our switching and so forth. I have never known in my whole railroad career where you would charge that to the industry.

I don't regard the movement of cars from the storage track to a spot within the plant a separate move, which, if the carriers performed, I don't think they would make a charge for it. In other words, if we didn't have to bring it from that storage yard we would probably have to bring an empty from our own yard, and it doesn't seem to me to be properly chargeable to the industry. Where you move cars to a storage yard and then another move to the spot within the plant, I don't believe you could make any further charge for that service. I feel it is our duty to make that spot without further charge. If we wouldn't put the car in the storage yard of the U. T. L. we would put them in our own storage yard and when the industry ordered an empty we would have to get the empty in either place (T. 5238–5241).

We have some industries along the line of the Illinois Central that perform their own service; just how many I can't say (T. 5258).

616 F. A. KEY, Jr., Traffic Manager, Louisiana, Arkansas & Texas Railway, was recalled as a witness and testified as follows (Vol. 6, p. 5385):

DIRECT EXAMINATION

I have acted for the past three years in the capacity of traffic manager for the L. A. & T. Ry. My jurisdiction takes in the Louisiana and Arkansas, as well as the Louisiana, Arkansas & Texas. In making allowances we do not choose any particular kind of traffic on which to render their service and not choose the other kinds. The controlling factor on which allowances would be made to industries, except allowances where allowance is made under the approval of the Commission as a result of the Tap Line case, is whether or not the industry can render the service at a less cost than ourselves (p. 5390).

As to the line of demarkation whether an allowance is granted, or is not, we consider the carrier responsible for moving carload shipments from point of loading to the point of unloading within reasonable limitations. Explaining those limitations, I would say an unreasonable distance might enter into the factor of an allowance or not allowance, or rather, responsibility for the traffic at some points, but where an industry track is constructed and connected up with our service tracks, it is my own opinion that we should and are required to enter into that industry and perform the service of spotting for loading and unloading unless there is some physical obstacle or hazard or something else that makes it impracticable. I would say that a curve that was too sharp for the locomotive to make would constitute a physical obstacle (p. 5391).

If the industry expressed a preference to perform the service which we feel legally obligated to perform and it was developed that the cost to perform the service by the industry was at a less cost than we could perform it, we would deem it proper to allow it (p. 5394.)

617 J. A. LYNCH, General Freight Agent, Texas & Pacific Railway, was called as a witness, and having been duly sworn, testified as follows (Vol. 6, p. 5403):

DIRECT EXAMINATION

I have been General Freight Agent for the Texas & Pacific Railway Company continuously since March 5, 1913.

The Texas & Pacific makes switching allowances to two industries at Waskom, Tex. These allowances were made to meet the allowance paid by the Louisiana, Arkansas & Texas Railway. Of course, competition had some effect on it (p. 5407).

CROSS-EXAMINATION

With reference to your question as to whether or not there is a difference that justifies a difference in the treatment of the Frost Lumber Industries and the International Creosoting & Construction Company, I understand, generally, that there is a difference but I have made no check. There has never anything come up which required our checking the different conditions (p. 5408).

The Texas & Pacific was finally persuaded to make allowances not only by competition but the fact that the Commission had found it proper in I. & S. Docket 11 procedure. I would not be able to give you any policy adopted by our company as to just what limit we would or to what limits we would not go in spotting on industrial tracks (p. 5415).

DIRECT EXAMINATION

I will give my response to the questions asked by Mr. Hagerty at the Monday hearing (p. 5975):

On Monday, May 16th, while I was on the witness stand in connection with the investigation of the allowances made by the
618 Texas and Pacific Railway to the Frost Lumber Industries and the Waterman Brick and Tile Company of Waskom, Texas, the Commission's representative, Mr. Hagerty, made a request that the Commission be informed of the reasons why the Texas and Pacific Railway does not assume the spotting service either by way of an allowance or by performing that service itself at the plant of the International Creosoting & Construction Company at Texarkana, Texas, and the Long Bell Lumber Company at Shreveport, Louisiana; also the Director inquired if such industries declined to permit the carriers to enter their premises or if the industries prefer that the carriers do not do so, and incidentally, I understand some inquiry was made informally as to whether the industries had made applications for an allowance for switching service performed by them in spotting the cars, which applications had been refused.

Upon returning to Dallas after the Monday hearing, I reviewed our files covering the matter of switching traffic to and from these industries, but could not find that any of the above questions had ever heretofore come up or had been considered by us.

The industry at Texarkana was established about the year 1902 or 1903, and the present plant of the Long Bell Lumber Company at Shreveport was established in the latter part of the year 1928.

As to the International Creosoting & Construction Company's plant at Texarkana, at the time it was established the plant was not within the switching limits of Texarkana, and while there was correspondence with the industry as to the placing of the plant within the Texarkana switching limits and establishing switching charges on traffic moving to or from Texarkana over other carriers, nothing

has ever come up with reference to the rail carrier performing the spotting service within the plant, or as to making an allowance to the industry for such spotting service it might perform.

The industry owns locomotives and locomotive cranes, and operates this equipment within its plant, and we might call attention to the fact that the plant is a rather extensive one, occupying a very large area, and to the best of our information, has some 28 or 29 miles of track within its plant. The plant is located on the west side of the Texas and Pacific Railway, approximately 2½ miles south of the Texas and Pacific station at Texarkana, and is also served by the Texarkana & Fort Smith Railway, a subsidiary of the Kansas City Southern Railway Company. On in bound traffic for the plant handled by the Texas and Pacific, the cars are shoved inside the industry property, from which point the industry's facilities are used in spotting the cars throughout the plant as they desire. Similarly, on out bound shipments to be handled by the Texas and Pacific, the industry places the loaded cars on its tracks adjacent to the Texas and Pacific connection, at which point the Texas and Pacific locomotives pick up the cars for handling from Texarkana.

As to the plant of the Long Bell Lumber Company at Shreveport,
I reviewed the papers, but could not locate anything having
619 reference to the questions asked by the Commission's representative in connection with this industry.

As previously stated, the present plant of the industry was established in the latter part of 1928 or the first part of the year 1929. This plant is also served by the Kansas City Southern Railway. The location on the Kansas City Southern Railway was within the switching limits of Shreveport, whereas at the time the plant was established the location was not within the switching limits of Shreveport, on the Texas and Pacific Railway. There was correspondence with the Long Bell Lumber Company relative to placing the plant within the Shreveport switching limits by the Texas and Pacific, which was done, and also the establishment of switching charges between the plant and connections of other rail carriers at Shreveport for the purpose of handling cars which would move to or from Shreveport over such other lines, but no mention was made of either the Texas and Pacific performing the spotting service within the industry or making an allowance for such service.

We understand it has its own facilities for shifting cars within the confines of its industry, and I, therefore, assume that the present methods of operation are satisfactory to them (pp. 5976–5977).

I have mentioned about five cases where we make an allowance in order to meet competition of other lines and in accordance with the decision in the Tap Line case that the allowance was proper. We have published an allowance at Willetts, a point that is not reached by any other line. In the Tap Line case I understand it (an allowance) is permissive. There are different situations around here where we felt that these industries should be on a parity with

the other industries, and in accordance, we established the allowance. We put them on a competitive basis (p. 5981).

These lumber allowances were not made to depend upon the question of whether the tracks were in good physical condition to accommodate our power or whether we could get in with our own power to service the plant. They were largely made upon the rate application to the Tap Line decision (p. 5982).

620 T. H. MEEKS, Asst. to Gen. Manager, Texas and New Orleans Railroad of Texas, called as a witness, and being duly sworn, testified as follows (Vol. 6, p. 5479):

CROSS-EXAMINATION

I am familiar with the service rendered by the Texas and New Orleans to the Gulf Refining Company. The T. & N. O. performed all of the service when the plant was first started back about 1906 and they did it until the plant grew and got to be a considerable size. When I went to this position in February 1918 we were doing some of the work. I am not sure whether we were spotting all of the stuff that we hauled in or not or whether we were pulling away from the loading point all of the cars that were loaded in the plant for outbound movement, but we were doing a considerable amount of it with our road crews. They also had a plant engine in there. I think that condition continued until November 15, 1922, when we put a switch engine on the plant. We maintained that engine in the plant constantly until this switching allowance was put into effect (p. 5480).

In general I would say I am familiar with all of the places for spotting in the Magnolia plant. I have not been over the plant in the last few months. Assuming that they are as they were when I was last over that plant, the various spots at which we have spotted cars are a part of the carrier's obligations as I understand it.

The practice of spotting cars in this country is to put them where they want them. I am speaking of the practice of the T. & N. O. I have worked for a number of different railroads and they all have about the practice and I understand from the contracts that we have with other railroads that it is generally about the same in this part of the country. I do not know anything about the southeastern part of the country or the East (p. 5727).

621 I started out working and was employed by the Mobile & Ohio; next the New Orleans & Northeastern and the Gulf & Ship Island. I have worked for the Southern Pacific four different times; for the Missouri Pacific three times; for the Santa Fe twice. I worked for the old Shreveport & Red River Valley, it is now the L. R. & N. of L. A., and I worked for them twice. I worked for the Cotton Belt, Texas & Pacific, Union Pacific, and some more but I cannot think of them all.

The practice on those lines about switching industries was about the same as it is on the T. & N. O. (p. 5728).

CROSS-EXAMINATION

The character of spotting is just the same in the larger plants as it is in the smaller plants, except in the larger ones we may in some cases have to go farther to deliver the traffic. Of course, in switching a plant it depends a whole lot on the size of the plant. If it is a small plant it may not be any more difficult. If it is a large plant and we find it more economical to hire them (the industries) to do it I think it would be good business to do that. Ordinarily, the team track spotting does not require as much work as spotting in the industry, because we try to fullfil our obligation, which I think is fullfilled when we place the cars on the team track, but in a lot of instances we have to go farther than that. In some cases I think you would say that the spotting within the plant would be simply a case of team track switching in a plant such as I have described (p. 5873).

In a large plant it takes more work to spot it up than it would at a team track, but in these extremely large plants they are more
622 in the category of industries where they have different tracks on which to spot cars. I would regard the service at one of these oil companies where we pay an allowance as the equivalent of team track spotting because if I had one car for team track and one car the industry, I could probably spot one as quick as I could the other. The reason we pay the industry to do the spotting service if it is no more costly than it would cost to switch it on the team track is that it is an obligation we have got to perform and it is a question of economy with us. It would be as cheap to spot a dozen cars on a dozen tracks in an oil refinery as to spot a dozen cars on a dozen team tracks. We would not shove them all on one team track. There might be one (car) going on each one of these team tracks in Houston. In that case we would have a great deal more cost (p. 5874).

623 J. H. TALLICHET, General Counsel, Texas and New Orleans Railroad Company, was called as a witness, and having been first duly sworn, testified as follows (Vol. 6, p. 5519):

DIRECT EXAMINATION

I am one of the general counsel for the Texas and New Orleans Railroad Company, and have been for a good many years, since about 1909; before that, I was a local attorney.

In passing on these allowances, and especially on the first one, that is, the Magnolia Petroleum Company, I went into the whole matter quite fully and have kept more or less in touch with it since the beginning. When the proposal was made to us that we make the allowance in lieu of doing the switching service ourselves at

Chaison, I originally had a rather unfavorable impression of it, probably because it was a new thing and I don't like new things; however, I went into it and reached the conclusion that within certain limits it might be legally done and properly done. The limits were, first, that the service for which we were to make the allowance must be one which we were legally bound to perform, that is to say, that it must not be an intraplant switching and must not be some unreasonable service or some service that went beyond our duty, that is, beyond what we were paid for as a part of the line haul charge. The second condition, that the allowance must not exceed the cost to us, that is, what we could do the work for ourselves, and that to be abundantly safe in such allowance, it was highly advisable that the allowance should be materially less than what our cost would be, that especially where there was likely to be fluctuations in our case; third, that the allowance must not exceed
the cost to the industry, and where there was likely to be
624 fluctuations as is generally the case, it ought, if possible, to
be materially under that cost. That in determining these things we should make, wherever necessary and possible, a very careful check to ascertain the cost, but the best way to go about it was, first, to ascertain the cost to the industry, and if it was entirely clear beyond question that that was materially less than our own cost, it would not be necessary to make any extended or expensive test of our own, but in case of doubt, that such test ought to and needs must be made. Within those limits, I advised our people—and I may add that I am satisfied they acted on this advice—that the actual amount is one that should be settled by negotiation and that it might properly be represented to the industries that they might very well be willing to do the work at somewhat less than their average cost, because there were some advantages to them, not necessarily in getting the work done exactly when they wanted it and in exactly the way they wanted it, and, generally, that has worked out that way. I advised our people also that I did not think there was any question of undue preference or anything of that kind about these allowances and, as a matter of law, there was no necessity why, if one oil company got 90 cents at one place, why any other should get 90 cents, or any other particular figure at any other place; that is a matter of law, but I also advised them as a practical matter I thought it was desirable that these allowances should be as stable as possible, they should not be working back and forth, a constant seesawing, because that would cause friction, and it was advisable to keep everybody quiet, and if the allowance did not transcend these rules I have spoken
of, or if it did not result in any more expense to us than we
625 could do it for or not put the industry to so much, it would
be in the nature of a special allowance or rebate, but they should try to get like industries to accept like amounts, and I think that is the reason that the 90 cents prevails among the several oil companies (5519–5521).

Now, on the question that the service must be one which the carrier is legally bound to perform—that was especially a live question at the time of the beginning and when the tests to ascertain the cost to the industry were being run. It struck me at the beginning, as I think it would probably strike anyone at first glance, that we had either been doing for these large oil companies and other industries a great deal of work inside of their plants that we did not do for ordinary industries and where we had not been doing the work that they were calling on us and expecting us to pay for a great deal of work that we did not do for other industries, but, on reflection and consideration, not on the work that we did for this industry or that industry, but taking the work that we do for a group of industries, say Beaumont or Houston, which would handle annually about the same volume of business at this industry or that industry, I concluded that we should consider the gross amount, not merely shifting our drag into their track, but that we must consider the work done in moving from our yards to a group of industries possibly equal in area or at least equal in the business they handled to these refineries. Well, when we looked into that, we found that the refineries were about the cheapest and the best places, from our standpoint, to receive and deliver cars, because there was not a very great variety in the kind of commodities handled nor any very wide differences in the places where we had to place the cars, so that we reached the conclusion that in making these cost studies the
626 whole work was to be done, excluding intraplant service and excluding, if there were any places where, on account of surrounding conditions or on account of track conditions, curvature or something of that kind, we could not get in, and excluding also places where for their own reasons the industry or refinery would not let us in, and that was what governed us on that. Now, as a part of the work we were doing for them or paying to be done, and considering whether it was our job or somebody else's, there comes in logically the situations of a group of sugar refineries in Louisiana that are referred to on page 3 of our return to the questionnaire to the Commission, and a group of quarries referred to on page 4. I reached this conclusion and so advised our people, that the industry was entitled to only spot a reasonable place, and were only entitled to that spot when we were ready to give it, that it was not to require us to discharge a part of the duties of plant operation. For example, at these sugar refineries, the method of unloading cane at the crusher is to shove up one car and unload it, and shove up another one and unload it; it requires the constant service of an engine, and we are of the opinion that that is not a carrier obligation, that if the industry wants that done, should provide its own engine or some other means of moving those cars. The same thing, only reversed in the case of the quarries, gravel and sand pits; that, of course, is a constant placing of cars under the chutes for unloading, and if they wanted that service, it would be up to them to provide it; we could run them in on a spot at the gravel pit,

if they had chutes under every pit, we could place them there, but there was no obligation to go any further. So also at these refin-
eries. For example, a rather strange example—if, for ex-
627 ample, the refinery has simply one or only a few places to unload cars and had to constantly be moving the cars for loading or unloading, that that was a plant operation and not a carrier obligation and we would not pay for it (5522).

By Dir. BARTEL:

Q. Let me see if I understand you there, Mr. Tallichet. Take at one of these refineries that has a loading rack, we will say, for gasoline, the rack will hold, say eighteen cars, they can load those eighteen cars as I understand it in an hour or two. Now, when those eighteen cars are loaded, they demand, of course, if there is business warranting it, to have those eighteen loaded cars moved out and eighteen additional cars moved in. Is that what you have in mind?

A. That is what I had in mind, that we would fill the loading track by the rack and put the others at some convenient place and go on about our business (5523).

We did not include in our allowance an allowance for the spotting of the other cars—and I don't think we are paying for that now. It is hardly possible that if they had been placed, say the engine went into the refinery and spotted eighteen cars and set the others on the side track and was about to go out, taking the eighteen cars loaded which it had previously placed empty, that it is a part of carrying them away; the engine foreman might very well fill that drag once more. But, I think that is quite unlikely to happen, and it is my judgment that that second movement is not our obligation, that the second movement is intraplant movement and if it is ever worked into our cost figures, we feel certain we have got under their cost figures enough to be sure that the allowance is enough to be above that loss.

Q. Say you have a number of cars for the Gulf Refining Company, say a string of thirty cars to be loaded with gasoline, their
628 loading rack will only hold eighteen, so there are twelve cars which are taken into the plant and left elsewhere than at the loading track. Now, if those eighteen cars are loaded and pulled back to your interchange track at the plant, do I understand it to be your position that the twelve cars, when they are subsequently moved to the loading rack and pulled from the loading rack to the interchange should be included in the allowance?

A. I will say this, that no allowance should be made on those twelve cars for spotting them at the loading rack, but after they are loaded, they are in the same position as any other loaded cars, and if that loading rack is where we can get them, we are under the obligation to do so (5523).

We make no charge for empty cars. The empties are entitled to one placement by the railroad. The allowance does not work in a

practical manner as an allowance for handling the empty car. The allowance for each load really includes more than the handling of that load—it includes the handling of the empty car in the opposite direction, whether it was inbound or outbound. The 90 cent allowance is really compensation for placing the empty and pulling the load. Although our tariff does not specifically provide compensation for handling empty cars, it, as a matter of fact, does include such handling, although the empty is not used in making an accounting. In figuring the cost per car, empties are of course reflected in the total figures. Where the industry requires several movements of the empties before they are completely loaded, it is our view that the common carrier duty is complete when a single placement of those empties is made. We are not charged, as I understand it, with any duty of helping the industry operate its plant; we are
629 simply charged with furnishing the cars at some reasonable and convenient place. A reasonable place is generally determined by custom, but probably more than that by mutual convenience. We do not want in any industry to go any deeper into the plant, or to take any more of our crews' time than we can help in keeping the patrons satisfied. At these plants, sugar mills, quarries, and gravel pits, they do not want to maintain any stronger track or more expensive track than they need for their own purposes, and do not want to be interfered with in the performance of their work. Therefore, in practice, a convenient place would be agreed upon between the plant foremen and the railroad conductors perhaps. Whether or not we regard it a common carrier service would necessarily depend upon the circumstances and conditions at each particular industry. The carrier's freedom in performing spotting service at a plant may be limited because of the physical conditions of the track as not being adequate to accommodate the carrier's power, or if for some reason the industry wants the cars placed on an interchange track at the gate of the plant or elsewhere in preference to spotting for loading or unloading. There may be cases where we might be obligated to put the cars into the plant, but in case of some disability we would make arrangements to have the plant engines perform the work because of the heavy power of the carrier. If an industry's track were narrow gage we would not make an allowance to it for handling its own spotting, because it would be a physical impossibility for us to operate standard gage equipment over that track unless the industry supplied a third rail. I have never had occasion to pass upon such cases, but if there were situations where the industrial track was standard gage but the rail was too light, or the curves too sharp, or the bridges too weak for
630 the operation of our engines, my test of whether or not we would do the work would be whether the physical disability of the track could be remedied. I think our allowances are limited to industries that own and operate their own engines—the nature of the business or the kind of commodities handled would not make any difference. The test we apply to an oil industry is the same

test we would apply to any industry under like circumstances anywhere on our lines in Texas and Louisiana, It is a question of fact, or possibly a mixed question of fact and law, where the plant obligation begins and the carrier obligation ends, and I think it has to be settled, in most instances, on the facts in a particular case (5527–5528).

As to the American Petroleum Company and the Sinclair Refining Company, I want to say this, we served them only through the Port Terminal Association as you understood from questions this morning. I think this return to the questionnaire is not entirely correct. It indicates that they do all their switching under their own power. I thought they were placing it all on one track, but there are some other tracks, I think, where the Port Terminal does some work. There is some track where the Sinclair does its own work, and gets no allowance, because it considers it a part of its plant work. The American Petroleum Company is outside of the switching limits, and they have been getting an allowance for themselves and also for doing some work for their neighbors, and we found it necessary to give our people an opinion that they could not take in other people's switching, and I think that leaves them out (5529).

By Dir. BARTEL:

Q. What difference does it make if they do it for somebody else instead of themselves?

A. We do not think an industry not a common carrier is entitled to do common carrier service and get pay for it; it is a technical position, but we do not think they have the right to do it; one reason for it is I don't think they are going to do it at a loss.

Q. We have several instances of that kind?

A. It is my judgment that it is not legal for an industry not a common carrier to engage in common carrier work for third parties.

Of course, a man can represent himself in a law suit, but
631 when it comes to practicing as a lawyer without an appropriate license, that is not proper to be done.

Q. We have had a number of instances where an industry gets an allowance for performing that service for others as well as themselves?

A. That is my opinion about it.

By Mr. HAGERTY:

Q. Is that service of one industry to another industry exclusive?

A. To the extent that they are doing work for a common carrier, I think they stand in the common carrier's shoes rather than in the industry's shoes (5529–5530).

CROSS-EXAMINATION

I think where the work which a common carrier owes to the public or anybody who offers freight, provided that right can be waived in

favor of the consignee and the consignee allowed to take possession of the stuff and handle it himself at a prior point than the law allows, I think that the railroad company as common carrier, if it lets some private party step in and do its duty, that it exceeds its authority and, you might say, surrenders its right to this third party.

The industry also can hire a third party, probably a common carrier, but where the third party is a shipper and excessive compensation is paid, it violates the law, and no matter how serious you may look you cannot tell me that Industry A is going to do a switching for Industry B at less than it cost A to do business. While A may be willing to do its own business at less than cost in order to get the work done at the time, and in the exact manner it wants, it is not going to do that for a third party, so I say it is a proper rebate in favor of the industry that is taking in the washing (5530–5531).

In an instance where a railway delivered 30 cars to an industry and the capacity of the loading track was but 18 cars, the spotting obligation of the railway would be completed when it placed
632 the 18 cars upon the loading track and left the other 12 cars at a designated point on the industrial tracks. This situation has not arisen to my knowledge, but I think as a matter of law if we placed the cars on any of the industrial tracks we have discharged our duty. As a practical matter we would either do that or hold the remaining 12 cars out on constructive placement and later place them on the loading track. That is, the shipper could order 18 of the cars delivered, and we would hold the remaining 12 outside in our yards subject to the constructive placement. A subsequent order to spot these 12 cars would be within the carrier's obligation. At the present time our railroad, as a line-haul carrier, delivers cars to the Gulf Refining Company at an agreed interchange track, and the industry removes them from that track under an allowance (5532–5533).

Under the demurrage tariff, and under the existing average agreement basis of the Gulf Company, free time begins to run from 7:00 a. m. after placement on the interchange track until the cars are returned. The matter of the carrier assessing demurrage until after they have completed the placement service has never been raised, but I believe the carrier has waived its right in this respect. I think the industry can waive its obligation to insist that it be exempted from demurrage, but could not waive demurrage. Delivery on the interchange tracks is delivery for all purposes. Under such circumstances an allowance to the industry may be made because the industry has waived its rights to have the carrier move the cars into the plant. The demurrage begins to run by tacit consent when the carrier places the cars on the interchange, and the carrier's liability ceases at the same time—one of the considerations for
633 this, it seems to me, is that we pay the industry for completing the movement to the plant. After the carrier has placed the cars on the interchange track, it is considered as a spot on the condition that this placement will be deemed the end of the carrier's

responsibility and the beginning of the industry's responsibility for demurrage and liability, but further conditioned on our payment of an allowance to the industry for the added movement beyond (5534).

In the cases of the quarries and sugar industries any obstacle interposed or any disability on the part of the industries which would prevent the carrier from free access for spotting purposes would prevent the service from being spotting or common carrier service. Reverting again to the instance of supplying 30 cars at one time to an industry which could accommodate only 18 cars on the loading rack at one time, I do not consider it the carrier's duty to return later and place the 12 cars upon the loading track. If the carrier did later spot the 12 cars on the loading track, it should expect pay for it (5537).

I heard the testimony of Mr. Hershey, of the G., C. & S. F., in explanation of the allowances paid by our company to the lumber company. I would not want to say that the allowances paid by the T. & N. O. to the several lumber companies in this proceeding are based upon the Commission's desision in I. & S. No. 11, the Tap Line case. The T. & N. O. pays an allowance to only one lumber company at one location—the Kirby Lumber Company at Voth, located on the T. & N. O. and the Santa Fe, 18 miles north of
634 Beaumont. Prior to the purchase of that mill by the Kirby Company it was served by an independent transportation company, the Beaumont & Saratoga Transportation Company, which received, under the Tap Line cases, an allowance of $3 a car. Not long after the Kirby Company acquired the mill and began the operation thereof, the Beaumont & Saratoga Transportation Company ceased to exist and the lines which it formerly owned and operated became a part of the Kirby Lumber Company. We studied the situation and found that the Santa Fe was going to pay an allowance of $3 and that that amount was less than it would cost us to do the switching and probably less than the cost to the industry. Consequently we published tariffs, as stated in our return to the questionnaire, and have since paid $3 a car. Other than lumber, the only commodity we get from that industry is a small quantity of outbound logs, and we do not make any allowance on logs. I think the tariffs simply call for Voth without any statement to show whether it is to the mill or not. My impression is that the log rates are Texas intrastate rates and that there is a provision in the tariff that no deductions are to be made, that they are net rates. We do not haul anything that moves into the mill. The Santa Fe and and the Kirby Lumber Company are close friends, and all we receive from the lumber company is outbound lumber to local points on the S. P. The T. & N. O. grants no allowance to any other lumber industry. We are sorry that we give that one (5612–5613).

The Kirby Lumber Company's track is not in condition for the operation of our engines, but the industry has told us that they would repair the track if we desired to do the switching. However, we are not accepting the offer (5613).

635 J. S. HERSHEY, General Freight Agent, Gulf, Colorado & Santa Fe Railroad Company, was called as a witness, and having been duly sworn, testified as follows (Vol. 6, p. 5567):

DIRECT EXAMINATION

I have occupied the position of General Freight Agent since 1904. Representatives of the Santa Fe, both legal and traffic representatives, were actively associated with the proceedings before the Interstate Commerce Commission, in what is known as the Tap Line case, I. & S. No. 11, I think. They were prominently identified with it from the start to the finish. The first decision in that case was dated April 23, 1912, reported in 23 I. C. C. 277. That investigation was instituted by the Interstate Commerce Commission on its own motion, concerning the operations of the so-called tap line lumber companies (5568).

As a result of these proceedings the Interstate Commerce Commission finally rendered a decision showing the conditions that they had found in the southwestern lumber district, and issued final report and order as to what the carriers might do, a permissive order with respect to through rates and divisions over the so-called common carrier tap lines which were in each and every case enumerated frequently in their decision. Later the Commission in supplemental order No. 4 provided for allowances to lumber companies for distances I think, not exceeding three, or perhaps only for a distance, in one case, a thousand feet—a distance of over two miles which might be allowed to lumber companies for switching lumber from the sawmills—manufactured lumber from the saw mills. The order in I. & S. No. 11 set out a permissive schedule of allowances which might be made by the railways to the lumber companies for transportation service performed by the lumber companies on manufactured lumber only, and was dated January 29, 1915.

636 At that time there was no hardwood production in this territory at all. Yellow pine was the lumber that was being manufactured and I think all the mills and all the short lines that were involved were engaged in the yellow pine industry. From the date of the decision of the Commission up to and until after the termination of Federal control we in no instance made an allowance to a lumber company for switching. We performed all switching ourselves, or if the lumber company performed the switching they did it without any compensation from us (5569–70).

Early in 1922 we made an investigation which contemplated perhaps a change of policy with respect to that matter of allowances to lumber companies. At that time the lumber was pretty well controlled by a comparatively few lumber concerns. We had been solicited in two or three instances by the industries to make them an allowance, but not with respect to most of them. Investigating, we found six sawmills that did switching, for which we paid as a

division on the through rate rather than as a switching allowance; 15 lumber companies for which we did not and never had paid; 5 lumber companies which might desire to do the switching where it would not be to our interest to let them do it. We made a canvass of every sawmill on our railroad. Those that did the switching, and those that did not—told them we contemplated a change in our methods, and giving them an allowance for switching those that wanted to do the switching. We provided by tariff for switching allowance to 19 lumber companies. That was the first tariff issued by the Santa Fe or the first allowance. The railroad had the privilege under the Commission's order at any time during the seven-year period from 1915 to 1922, of making the allowance if it so desired (5571–5572).

CROSS-EXAMINATION

If the railroads make those rates applicable from their own
637 tracks—from their own station instead of a mill, I suppose the question of allowance never would have arisen. The Commission based its decision on what they found existing in connection with the lumber mills. It is not a fact that on the Santa Fe the railroad was applying the rate from the mills if the mill was several miles out on the railroad. We would not pay for bringing it into the railroad by tram road any more than by an oxen team. I think under the present conditions we would pay for switching service from the mill to our track—not only with respect to lumber but with respect to most anything else. If we could find it was an economical thing for us to do that, we should do it (5575–76).

Prior to 1922, when we changed our policy, in many instances the mill performed the service between the mill and the railroad without an allowance. In other instances the Santa Fe did the switching. At that time, in some instances, we said to the industry, "hereafter, if you can arrange to switch your own industries and it is convenient for you or you think it would be economical, we would be glad to have you do it." We treated every industry, local to competitive points, alike. Before 1922 some of the mills assumed that service and paid the cost themselves, and we did not recognize in those instances that the rate applied from the saw mill. That was and still is a permissive proposition. When we paid those allowances we did not change our rates. However, we made it apply from the mill before (5575–76).

These decisions, talking about the Tap Line divisions, was the net amount which made up out of the rate to the junctions and such arbitrary that accrued to the tap line. They permitted those hauls to charge more if they wanted to, but they did not permit the trunk line to charge more. The railroads were authorized by the Commission where they maintained their rates from the mill to
638 make the allowance not exceeding the maximum announced in the tap line decision. We do not find it necessary to make

those allowances we have discussed today because we have applied our rates from the mill. That is not our reason at all. We find that some few of the railroads permitted them to switch the mill and thought they had to be paid for it because these mills on other railroads were receiving those switching allowances. That was one reason in a few instances. The part about it was, however, that we thought we could employ these lumber companies to perform their own switching cheaper than we could do it—the saw mills being close to our tracks—those being quite a distance away having been cut out. Answering your question as to why we were concerned about the switching from the mills to the railroads if our rates were not applicable to the mills, we were not concerned about it. We had authority from the Interstate Commerce Commission to do this thing which we did from these mills that were located in some instances as far as three miles from the railroad, and 50 miles away on the tap line. At the industries under discussion to day, I would say that on lumber our rates from those locations were made applicable from the mill. For that reason we made an allowance, as we could not make the allowance otherwise (5577).

There is a reasonable limit to which a railroad could be expected to go away from its tracks for any kind of traffic, and the less remunerative the traffic is the less distance they certainly could go (5580).

There must be some limit and that limit is just common, ordinary traffic sense. I would say that if there was a concern shipping 25,000 carloads of canned goods per year, I would go a good many miles after that, and request our railroad to build a track farther.

639 It is a matter of business judgment. That is the only way you can measure those things. What will apply on one commodity will not apply on another. Taking a construction material company producing gravel, certainly we could not go to their pit where they have the operation of loading a car at one point and moving the car on. That must be a plant service. The limit beyond which the railroad should not go or should not be required by law to go is fixed by the volume and the value of the business, and no rule can be fixed on that.

640 W. E. Maxson, Assistant General Manager, Gulf Colorado and Santa Fe Railroad Company, was called as a witness and having been duly sworn testified as follows (Vol. 6, p. 5586):

DIRECT EXAMINATION

I am Assistant General Manager of the G. C. & S. F. Railway and have been for many years. The record shows a number of industries, sawmills, to which allowances have been made, since about 1922, and there are certain other industries also that these allowances have been effect, perhaps for a lesser time, sulphur companies and paving companies which are also involved in this proceeding.

I have prepared an exhibit showing the basis used in determining cost to apply in connection with the service being performed by industries at points on the Gulf Colorado and Santa Fe and will explain it (5587).

With reference to my former testimony I do not want you to understand by that that I would say that we would hire all of the mills to do all of the work over all of the railroad. In some cases they could not do it cheaper than we could. Of course then we would not hire them but when you go over a 180-mile district with a locomotive and train and your hours of service are based on eight and time and a half after 8 hours, your costs commence mounting very rapidly, and where you can farm out work at a number of points where your crews are delayed the more and where the money you pay is our penalty—time or time and a half, why you can make money pretty fast by employing someone else to do your work up to the point where you can move your trains on schedule and without paying overtime. That describes our policy (5599).

641 Now in connection with all these mills and in undertaking to determine the cost basis, based upon the engine hour method, our cost fluctuates perhaps from year to year or the volume of traffic handled has a direct bearing upon the amount of the cost per car. The cost is also influenced by the type of locomotives and whether the train crews are operating on straight time or overtime basis. From my observation and experience I would say that at each of the industries to which I have described, there is performed by the industry a common carrier service in spotting the cars. I regard it as our duty to perform service which they perform unless we can hire the industries to do it for us. I regard it as in the interest of the Treasury of the Santa Fe that at each of these industries these operating arrangements and allowances have been put into effect. And it is the desire of the railroad company to continue these arrangements because of economical and other reasons (5603–4).

CROSS-EXAMINATION

I meant to convey the information that the service was identical with the service we perform ourselves at the adjoining stations where we perform the service ourselves and do not employ the industry or authorize them to perform the service for us. There are some points at which we do not perform the service and do not make an allowance.

The considerations that determine in my mind as a practical operating man to what limit we should go to perform the service on an industrial private plant or track would depend very largely on the character and volume of the traffic. The only thing that has always impressed itself on me and I have endeavored to impress on our associates is that we must do the thing that we are obligated as a common carrier to do in as economical manner as possible.

642 B. H. STANAGE, Traffic Manager, St. Louis-San Francisco Railway Company, was called as a witness, having been first duly sworn, testified as follows (Vol. 6, p. 6043):

DIRECT EXAMINATION

The St. Louis-San Francisco Railway Company charges the other connecting lines at Tulsa for switching interstate traffic $6.30 per car. This charge is shown on page 30, of that carrier's tariff I. C. C. 9570. On intrastate traffic we have varying charges to different lines. The charge to the Santa Fe and the Missouri-Kansas-Texas is $2.70 per car, and to the Midland Valley, $2.25 per car. We also have a rate of $2.25 a car to the Oklahoma-Western Railway and the Sand Springs Railway at Tulsa.

The rates on Oklahoma State traffic are shown in Frisco Tariff 218–A and are based on distance. These rates were established under an order of the Corporation Commission of Oklahoma.

The interstate rate of $6.30 per car, referred to is a reciprocal switching rate, was voluntarily established by the carriers. The rate contemplates the moving of an empty car from a connecting line interchange track into a plant—the Midcontinent Plant for example—and after the car is loaded a movement in the return direction of the loaded car back to the interchange with the connecting line from whom the empty is received; or possibly it might be an empty car furnished by the Frisco, loaded at the industry, and then switched under load to the connecting line interchange. It covers the necessary service of moving both the empty and the load and the placing of the empty in a position accessible for loading, or the loaded in a position accessible for unloading on the industrial tracks at the spot desired by the industry.

I know of no instance in reference to the application of switching rates on our line of railroad, where they do not in-
643 clude that kind of service and that extent of service in reaching an industry. I do not think we have any; nor do we have any switching rate that carries the traffic only to the gate of the plant and no further (T. 6043–6045).

644 W. N. DERAMUS, General Manager, Kansas City Southern Railway Company, resumed the stand and testified as follows (Vol. 6, p. 6106):

CROSS-EXAMINATION

I will undertake to explain the difference between carrier service and industrial service on the plant tracks. Carrier service within the plant has reference to that service which the railroads are obligated to perform within the different industrial plants, consisting largely of, I would say exclusively of, moving loaded or empty cars, as the case may be, to the place of unloading or loading within the plant, and then from that location back to the rails of the carriers.

Industrial service has reference to that work which has to be performed in most of the large plants, which is generally termed intra-plant switching, and involves the movement of cars, either loaded or empty, from one track to another within the plant after the original spot has taken place.

The services the carrier is clearly obligated to furnish at its own expense is the carrier service on the plant tracks.

With reference to the consideration in determining what service the carrier is obligated to perform—it has been the practice for years and years or railroads throughout the country to assume the obligation of setting cars up for loading and unloading. The service rendered by the railroads, or for which we feel as though the railroads are responsible, in these particular industrial plants is precisely similar to that that we render to the plant which does not perform its own switching service. For instance, at any industry where the carrier takes care of the switching service exclusively, it invariably is the practice, and has been for years, for the carrier to spot the cars to the unloading dock or the loading dock, as the case might be. In other words, set them up for loading and unloading wherever the industry might direct it. It is that service that I refer to as work which the carrier is obligated to perform within these plants. I do not recall offhand of any condition or circumstance under which we would not recognize that obligation, so long as the physical conditions are such that we could reach the point of loading and unloading.

645 In any case where the plant would not permit us to enter in and upon its industrial tracks, I would still feel as though we had that obligation to perform whether we performed it or not. I can not conceive of a plant declining to permit us to enter upon their facilities and perform that service if some other satisfactory arrangement by which the same service can be performed is not or can not be worked out. In case the physical layout of the tracks, the curvature, weight of the rail, and other physical disabilities did not permit the power of the Kansas City Southern to negotiate the plant tracks, that would bring up another question. I can not conceive of an industry of any size constructing tracks that would not permit the carriers with whom they connect to reach places of loading and unloading. I can not think of any on our line (6106–6108).

With reference to the Frisco railroad owning and maintaining the track within the industrial enclosure of the Mid-Continent Refining Company at Tulsa, Okla.—and the reason for the Kansas City Southern not assuming all of the costs, including interest upon the value of the tracks and maintenance of the tracks, in addition to cost of operating the engine in those plants, goes back into history and past practice over a number of years. While there are, perhaps, or have been a good many exceptions to that rule, our policy is and has been to look upon it as an obligation of the industry to provide

those tracks. It was because of that fact that no allowance for interest or maintenance or anything of that sort on tracks owned by the industry in the particular plants referred to was included. Generally speaking, our policy is to build or construct a track at our expense out to the right-of-way line, providing that does not involve construction of track for a distance beyond that which we would consider reasonable, and then look to the industry to construct the track and maintain it in the industry. There may be exceptions here and there, but we try to hold to that policy. The Kansas City Southern will perform service if the industry furnishes the tracks beyond the right-of-way. I know of no instance where our
646 company furnished a track as well as the locomotive service. There may have been some, but I can not recall any at this time. Instances of that kind would undoubtedly involve peculiar and perhaps extenuating conditions (6108–6110).

Why, it first came to the attention of the operating department that the Magnolia were doing some of the switching in their plant, and, as all honest operating men usually do, they, of course, permitted the Magnolia to do it. That went along for quite some time. We realized, I believe, from the beginning, that they were performing a service that we were reasonably obligated to perform. Eventually Mr. Maddox, of the Magnolia Refining Company, concluded that the carriers—that plant is served by both the Southern Pacific and our line—should either come into the plant and take care of this work with their own power and own crews and at their own expense or perhaps find some way to reimburse the oil company or refining company for the cost of that service. I am quite sure—I don't want the record to indicate that I am positive about it—that the idea of making an allowance originally to the Magnolia in lieu of the carriers performing the service themselves originated with the Southern Pacific. When the question came up as to whether the Southern Pacific and ourselves were to go into that plant and perform the service that we were required to perform within the plant enclosure, the Southern Pacific appreciated that if we had to do that it was going to be a terribly expensive thing for them, and I believe they probably suggested an allowance to the Magnolia in lieu of serving that plant directly themselves.

I think it was their intention to have both of the carriers in the original conference at which the whole matter was discussed, but our representative in that territory on that particular day happened to be out of town, and I believe the conference was between the Magnolia and the Southern Pacific operating representatives. The Kansas City Southern learned of that later on. There seemed to be some misunderstanding or some apprehension on the part of
647 the Southern Pacific, and perhaps on the part of the Magnolia company, as to whether an allowance of that nature would be entirely proper and legal. With the thought of clearing up any misunderstanding in that respect the Magnolia—and perhaps the

Southern Pacific—decided to put the situation as it existed before the Interstate Commerce Commission for consideration and advice. After due consideration the Commission indicated that there probably would not be anything wrong with making a reasonable allowance under the circumstances existing there in the Magnolia plant. In that way the inception of this whole thing got under way. The Southern Pacific made the allowance first.

Consideration was given by the Kansas City Southern as to whether it would be more satisfactory and less expensive to take over the switching or make the same allowances as the Southern Pacific were making, and we elected to make the same allowances because we felt that it would save us money and it would be more satisfactory to the industry. We did not think the allowance of 72 cents at that time at all out of line. We felt it was certainly well within reason (6110-6114).

In the first place, we were zealous not to make an over-allowance. We wanted some cushion behind this allowance that was made, to give us at least reasonable assurance that the allowance was not in excess of what it was actually costing the refinery to perform our service within the plant. We made the cost study in connection with the 90 cent allowance and I believe in every case the cost study figures indicated that the actual cost for carrier account in the plant was in excess of 90 cents. The traffic department, through negotiations with the refinery, worked out the 90 cent rate. There were conferences from time to time between our offices as to what this allowance should be and how strong we could afford to go. I can not state how long the Magnolia Petroleum Company performed its own service without an allowance. The Magnolia Company was handling all of the cars for some little time prior to the allowance, but it did not do all of it at the inception.

The industry was performing work that we thought the
648 Kansas City Southern should be performing, I would not attempt to say for how long a period. At the beginning, the carriers performed all of that service, and as I have said before, as time progressed the need for their own power or engines to handle strictly intra-plant service developed and eventually that same power was used in performing certain carrier service within the plant.

The Kansas City Southern performed rail service on the industry's tracks of the Gulf Refining Company at Port Arthur, Texas, pretty largely right up until a short time before this allowance was made. The Gulf Company put one small engine in service in 1919. That locomotive was confined principally largely, if not exclusively, to the handling of intra-plant work. At one time, I think in 1923, the Gulf Company had two engines in service in their plant and they were performing a good deal of service that we were obligated to perform, and in order to rid ourselves in part of that expense, I recall they pulled off one of those engines and told us to come in and perform our job as we were obligated to perform it. That engine was off for quite a number of years. In other words, for a good many years, or

at least for a substantial period of time, the Kansas City Southern was performing rail service on the private tracks of the Gulf Refining Company.

The furnishing of locomotives by the Gulf Company to handle its intra-plant work had its inception in connection with quite an extensive expansion and perhaps maintenance program undertaken by the Gulf Company in the latter part of 1919. Later on the industry took over some of our switching; in a voluntary way, probably one yardmaster trying to help out another yardmaster, and from time to time the refinery expanded their service, or the Gulf Company expanded their service, until about the early part of 1924 they were doing most of our switching in the plant.

When the improvement program of the Gulf Company was pretty well out of the way, they still found they could use this engine in moving their business from one point to another in the plant and held on to it, primarily for that purpose at the time, but
649 there was perhaps some idle time on the part of the crew and they used that to help us out. That was in the beginning. As time went on the plan of operation spread because we looked upon it as a very satisfactory arrangement from our standpoint. Even though we would eventually have to pay a reasonable allowance for the service, the wonder to me is that we did not try to work out something like that before (6115–6119).

I don't think the industry could get along without a system of tracks within the plant to perform their intra-plant service. They could call upon the Kansas City Southern to perform that service but under the tariffs intra-plant switching comes at an extra cost. That is not a part of the service that the carrier ordinarily renders for the compensation that is received in connection with their road haul movement. If the same questions were asked me with reference to the operation at the Texas Company at Port Arthur, Texas, as those in connection with the Gulf Refining Company, my answer would be the same. I believe we performed all of the service within that plant pretty close to the time that the allowance was made.

The Texas Company had an engine in their plant for a couple of years ahead of the Gulf Company and were doing their intra-plant work, perhaps not exclusively, for quite a number of years. It might run back as early as 1911 or 1912. That action was taken on the part of the refinery.

I could not say of my own knowledge, but undoubtedly we performed that service within our own power in the beginning; as the plant grew and as the need for intra-plant movements increased, of course, the cost of that intra-plant service performed by our company for account of the refinery increased in proportion to the increase in movement, and I imagine the Texas Company were prompted in putting that engine in there, originally, entirely from an economical standpoint. They figured they could provide their own engine and do that work at less cost than they were paying us for the same service. Insofar as the carrier service was concerned, it

650 was gradually assumed by the refineries, probably upon the action of yard crews or local people, and without any knowledge on the part of our head offices. All of us who have had anything to do with yard operation know how those things take place, I will do something for John and he will do something for me, and the practice just grew and the refinery was willing to do this work, as indicated by the fact that they were doing it, and we permitted them to do it.

The allowance feature was handled through the traffic department (6119–6122).

The Kansas City Southern performed the railroad service at the plant of the Texas Company, Port Neches plant, up until about 1922 or 1923, prior to the establishment of the allowance. The Texas Company at this plant had an engine that confined its activities largely to the handling of intrastate cars and particularly to the movement of traffic between what we call the asphalt warehouse, the manufacturing plant, and the docks along the Neches River.

I am not so sure but what insofar as Port Neches was concerned, that was worked out between us. They had this engine over there, and it was undoubtedly of some considerable importance to us to work it out so the Texas Company could look after our switching in that plant. Port Neches is quite some distance from our center of activity, the transportation yard at Port Arthur (it is about 11 miles), and we had some difficulty in taking care of all the work in Port Neches at that time with one engine without running into overtime of rather an expensive nature. Because of the peculiar condition at Port Neches, I am not so sure but what we urged the Texas Company to take over that work.

The plant of the Pure Oil Company is comparatively new. It was completed in 1924. During the period of construction, we did all of the switching intra-plant and otherwise. Some time after the plant was completed and placed in operation, the Pure Oil Company provided an engine, and co-incident with the provision of this locomotive, it was worked out that they should take over the
651 switching, and they have since performed that service at 90 cents a car. We made a cost study there and determined that 90 cents was not out of line. We determined to our own satisfaction, at least, that the allowance was less than it would actually cost the industry to perform the service. We did not believe that we could go into any of these plants and do the carrier's switching that needed to be done in there day in and day out in any less time than the refineries were doing it. For that reason it appeared clear to us that it was much more economical to have the refineries take care of our switching in the plants. I would say that our engine costs would be in excess of $11 an hour. We determined upon this cost study made in each of these plants, how much time it took the industry to render this carrier service. We concluded from those studies that it would not be possible for us to perform the carrier service within these plants day in and day out in any less time than

the refineries were performing it, and could perform it, and did perform it within the cost study periods. We did not consider intra-plant service at all. The time on intra-plant service was thrown entirely out.

I imagine the service at the Magnolia plant in normal times would require almost constant service. I do not imagine there would be very much interference between the industry power and rail power (6122–6126).

If the cars used in plant service, spotted at one loading point and then moved from there to another point to complete loading, I would regard that as plant service. If we were doing switching in any one of these plants—say the Magnolia plant—and they partly loaded a car at one location and wanted it moved over to another location to complete loading, we would look upon that, insofar as charging for that extra movement is concerned, as an intra-plant move. We would charge them for that extra movement, but we could not charge them anything for car rental or demurrage.

In respect to the handling of tank car shipments of asphalt at Port Neches, it is my understanding that those cars are loaded at high temperatures and often times pull out and permit it to cool
652 off and possibly switched back to the rack for topping or further loading, and that the cars are also weighed on the track scales in our plant. All of that would be included as intra-plant switching (6132–6135).

653 H. A. WEAVER, Vice-President in charge of Traffic, with the Kansas City Southern Railway Company and the Texarkana & Fort Smith Railway Company, was called as a witness, having been first duly sworn, testified as follows (Vol. 6, p. 6138):

DIRECT EXAMINATION

I am Vice-President in charge of Traffic of the Kansas City Southern, and Second Vice-President of the Texarkana & Fort Smith Railway. I became Vice-President in charge of Traffic June 1, 1930, prior to that time, for about one year, I was Freight Traffic Manager, and prior to that General Freight Agent. I was in the service of the Kansas City Southern at the time the allowances to the refineries in the so-called Sabine Basin District were established.

As to how these allowances were established and the facts surrounding the establishment are as follows:

Well, the matter first came up in October 1921 at a conference between Mr. Maddox of the Magnolia Petroleum Company and Mr. J. O. Hamilton of the Texarkana & Fort Smith Railway and Mr. C. K. Dunlap of the Southern Pacific, at which time Mr. Maddox said that his engines were in rather bad condition and that he had made some investigation and found that they were doing a good deal of work that the railroad company should do in the way of spotting cars and handling loads to and from the connection. There wasn't anything further done with it until along in 1923, as I recall it.

So far as our road's part: Then it seems that Mr. Maddox tried to arrange a conference with our superintendent, who happened to be out of the city, but he did look over the terminals with the operating people of the Southern Pacific. At that time he asked that the Magnolia Petroleum Company be—no, that the Southern Pacific Company come in and perform the service in the handling of
654 cars between the Texas & New Orleans and the Magnolia tracks. In April 1923, April 27, 1923, Mr. Maddox wrote Mr. J. F. Holden, who was at that time vice president in charge of traffic, in which he said that the Magnolia Petroleum Company were performing a good deal of service that the railroad, the Texarkana & Fort Smith Railroad Company, should perform, and that he had made an arrangement with the Southern Pacific Company whereby the Magnolia Company would perform that cost for them at a cost of 72 cents per car, and said that, "possibly we might desire to make the same arrangements rather than to switch the plant ourselves."

That allowance was published by the Southern Pacific and we, rather than go and serve the plant, said that we would make the same allowance as the Southern Pacific and the Magnolia would perform the service for us.

That allowance was published first in the Texas & New Orleans Switching Tariff effective May 25, 1923. For the Texarkana & Fort Smith we published it effective June 20, 1923, or approximately 30 days later. Prior to the publication of this allowance of 72 cents the matter was submitted to the Interstate Commerce Commission in the form of a joint statement signed by Mr. Maddox for the Magnolia Petroleum Company and the attorneys for the Texas & New Orleans to determine the legality of such an allowance. The secretary of the Commission replied that if the service performed was a service that the carriers should perform there was nothing illegal in making the allowance, and they referred the secretary to a conference ruling of the Interstate Commerce Commission, No. 360, which reads as follows: "Held, that an allowance purporting to be made under Section 15 must be regarded as a concession from the railway unless duly published by the carrier in its tariffs and thus made available to all shippers furnishing a like facility or performing a like service of transportation in connection with their traffic."

655 After receipt of this letter from Mr. Maddox, Mr. Holden wrote to The Texas Company, Mr. Jervis, and to Mr. Ellis, of The Gulf Refining Company suggesting to them that possibly they might want to make an application to our company for a similar allowance, as their companies were performing the same character of service as the Magnolia was performing for the Texarkana & Fort Smith.

Tests were run by both representatives of the Texarkana & Fort Smith and the Southern Pacific Company at the Texas Refining Company's plant, the Island plant, the Asphalt plant, and the Gulf Refining Company's plant to determine the cost of the service which the

refineries were performing which we should perform. Those costs have been submitted by Mr. Deramus. The ultimate conclusion finally was that, after the tests were made at the Gulf Refining Company plant and The Texas Company plant, that the allowance should be 90 cents per car. This understanding was reached at a conference in Mr. Dunlap's office in Houston along in 1923, I think (6138–6140).

Subsequently the Magnolia Petroleum Company felt that they were not getting a sufficient amount of money for the service that they were performing for the carriers and they asked that an increase be made to $1 per car. A test was made between the Southern Pacific, jointly the Southern Pacific and the Texarkana & Fort Smith, in making a check of the Magnolia plant and it was found that the cost was something over $1 a car by that check; so we then agreed to increase the allowance to the Magnolia Company to 90 cents. We, of course, realized that these companies were performing a service that we should perform at their plants and without any cost to us, and we would have been very glad to see that arrangement continued, but after the Magnolia Company had made a demand that the companies either perform the service or pay them for doing it we
656 elected to pay then; and we concluded that it was nothing more than proper that we should also make the same offer to the other companies (6140–6141).

As to why it took us over two years after Mr. Maddox made the first request, for an allowance, to comply—Mr. Maddox stated that, in his opinion, he was doing some work for the companies that we should do. During that time the matter was being handled with the Interstate Commerce Commission by the Southern Pacific and their attorneys. The first time the matter came to our attention was on April 27, 1923. He said that he was going to have to get some new engines; that they were performing a lot of service for the Texas & New Orleans and our company for which we ought to pay them, or we ought to come in there and do the work ourselves. He didn't insist upon that.

As to why we didn't either pay an allowance or perform the switching within the plant for a period of two years after the request of Mr. Maddox was made, in 1921—he didn't make any demand at that time. It was merely a discussion, and he expressed the opinion that they were performing a service which we should perform. We were perfectly willing to let the industry go ahead and perform the service, as long as they were doing it.

Mr. MADDOX. And I wanted the record to show that the Magnolia Petroleum Company has never asked for an allowance; has never yet asked for an allowance and reluctantly accepted an allowance upon the proposal of the Southern Pacific.

Mr. WEAVER. We recognized that possibly we had an obligation in connection with the service at those plants; but they were performing the service and as long as they were willing to do it we were willing to let them. We would not have hesitated to perform the

service if Mr. Maddox had demanded that we go in there and perform that service. I regarded the conference held in 1921 merely as a starting of these allowances in the Sabine District (6141–6143).

657 CROSS-EXAMINATION

The first intimation of making an allowance was the letter from Mr. Maddox to Mr. J. F. Holden, dated April 27, 1923. In that letter Mr. Maddox said that he had made a demand upon the Southern Pacific to perform the service, and the Southern Pacific had asked him to perform the service for them, and that they had agreed upon a price, an amount of 72 cents; and we agreed to allow the Magnolia Petroleum Company the same amount to perform the switching service for our account.

I would consider the letter from Mr. Maddox to Mr. Holden as a demand that we either perform the service or else make the allowance. The matter of an allowance was first brought to my attention by that letter, with the arrangement made with the Southern Pacific, and suggested that we might desire to make a similar arrangement rather than perform the service ourselves.

A letter from Mr. Maddox, dated April 27, 1923, to Mr. J. F. Holden, was received in evidence marked "Commission's Exhibit No. A–122, Witness Weaver."

Upon receipt of that letter (Exhibit A–122) we agreed to make an allowance, or allow the Magnolia Petroleum Company the same amount that the Southern Pacific were allowing them to perform the service for our company. That was a voluntary action on our part, we elected to get them to do the service instead of performing it ourselves, because we thought that it was cheaper than we could perform it.

Our operating departments are rather adverse to switching plants; they say it is expensive, and where they can make an arrangement to have the plant switched it is undoubtedly a saving to us. This arrangement was made to meet the competition of the Southern Pacific as well as a saving to our company. So far as I was concerned, I merely handled it as a matter of competition of the Southern
658 Pacific. So far as serving the refinery is concerned, we would prefer to make the allowance rather than perform the switching service. We realized that we could not perform the service for 72 cents per car (6144–6148).

A letter dated June 1, 1923, addressed to Mr. L. F. Loree, Chairman of the Executive Committee, New York City, and signed by Mr. J. A. Edson, President of the Magnolia Petroleum Company, was received in evidence and marked "Commission's Exhibit No. A–123, Witness Weaver."

By Mr. HAGERTY:

Q. Now, Mr. Weaver, that letter doesn't embody any reference to operating efficiency or operating economy to the Kansas City Southern Railway as a consideration for making the allowance, does it?

A. Not at all.

Q. And we found no such references in any of the matter under consideration by the Kansas City Southern executives. Do you know whether or not the question of efficiency and economy in operation to the Kansas City Southern was ever presented to your executives in connection with the service at the Magnolia plant?

A. I don't think—not to my knowledge.

Q. Are we to understand from that that so far as the Kansas City Southern allowance to the Magnolia is concerned it was purely on a competitive consideration?

A. Yes, sir.

Q. Competitive with the Southern Pacific?

A. Initially so.

Mr. DAVIS. I want to know, if I may, whether the witness was answering that purely from his own personal standpoint or not.

Mr. WEAVER. Just from my own knowledge.

The allowances which were subsequently arranged in connection with the Gulf Company and The Texas Company were not predicated upon the same competitive factor which induced the allowance to the Magnolia Company. The arrangement made with the
659 Magnolia Company, the agreement to allow them a certain revenue, 72 cents per car, for the performance of the service for us established a precedent that was applied to the other plants. In other words, if we were going to make an allowance to the Magnolia Company for service that they were performing for us we were willing to do the same thing at the Texas and the Gulf plants.

Mr. Holden wrote them a letter suggesting that possibly they might desire to file an application for an allowance, and as far as my knowledge goes, up to that time neither the Gulf Company nor the Texas Company had asked the Kansas City Southern to make an allowance. These refineries made a formal application for an allowance which was considered by Mr. Holden's office.

I think that Mr. Holden wrote the Pure Oil Company and told them that we were making an allowance to the Gulf and the Texas Company and Magnolia for services that they were performing for us and asked if they wanted to make an application for a similar allowance. The granting of allowances to all of these oil refineries was largely one of competition and discrimination (6149–6154).

660 C. E. JOHNSTON, President of Kansas City Southern Railway Company and the Texarkana & Fort Smith Railway Company was called as a witness, having been first duly sworn, testified as follows (Vol. 6, p. 6160):

DIRECT EXAMINATION

I am President of Kansas City Southern Railway Company and the Texarkana & Fort Smith Railway Company.

I became president of these railroads on January 1, 1928, succeeding Mr. J. A. Edson. At the time I was general manager of the Kansas City Southern and 3rd vice president of the Texarkana &

Fort Smith, I discussed the matter of switching the Magnolia Refinery with our operating officers. The matter was discussed among ourselves for quite some time after Mr. Williams received the information from Mr. Hamilton at Dallas, after his talk with Mr. Maddox, of the Magnolia Refinery. Our conclusion, as to whether or not it would be more desirable and more economical, from a railroad standpoint to make an allowance, or perform the carrier switching service at those plants, was a matter of cost to us. In the first place, the refineries in that district started with nothing and we did the switching when these plants were very small. These plants in the district grew and expanded fast and the situation grew into the conditions at the Magnolia and the same at the other plants that caused the refineries to feel that they were doing too much work for the carriers without compensation. We had gone along with it for a good many years without having to perform considerable work that perhaps we were obligated to perform, and naturally, we disliked to see our cost increased, and the matter of an allow-

661 ance as against our performing the actual service, was a question of dollars and cents. We recognized all the time that the refineries had a legal right to call upon us to perform the service or compensate them for doing our work for us; and after the matter had been agreed upon by the Southern Pacific and the Magnolia and at the price per car that was set up it was very clear to us that we could not perform that service within the plant for the amount per car, that had been agreed upon, and we were under the circumstances agreeable to that figure.

As to whether there is any industry on our line, which because of the amount of trackage, or for some other reason, we feel it would be beyond our obligation to perform either the spotting of the loaded cars, or the placing of the empties on a switch track—generally speaking—I know of no particular industry referred to, but as a general proposition I don't think there is any question but what we are obligated, particularly so in performing the line haul on business, to spot the shipment at the point of unloading of the industry.

I would not say the same thing would apply to switching—you can not go to the same extent in switching, because you don't get paid for an unlimited amount of service. I would say generally in switching that you do have to spot cars, but there is a limit, to how far we would be obligated to do it for the charge that is made. To a large extent there is the same obligation to spot cars in switching service as there is on line-haul service (T. 6160–6163).

662 I think you are obligated to spot cars at the point of loading on switch business.

CROSS-EXAMINATION

We were perfectly satisfied to go along as we were, by reason of the fact it meant additional cost to us. In this particular case of

the Magnolia the negotiations largely, as I recall, were with the Southern Pacific in the first instance.

At the time I was general manager, and prior thereto, our railroad was performing the spotting service at all of these plants with our own power. The circumstances which caused our company to discontinue this practice are these: In the first place, the general yardmaster or the yardmaster of the railroad worked very closely with the yardmaster of the refinery, and if they could trade work among themselves it was permitted. Again, that territory grew very fast, and as the refineries installed switch engines it meant a saving in cost of operation to us to permit the refineries to handle as much of our business as they saw fit and convenient to handle, and that sort of grew into a regular practice.

The question of whether or not an allowance should be made the industry, and how much, was discussed from every standpoint many times during this period by myself and the vice president in charge of traffic. Operating cost was also the principal subject of conversation between my executive—the president—and myself.

I made recommendation to our president, with respect to the amount of an allowance, and he accepted it—and it was a trade as to cost studies, because the figure was fixed arbitrarily after we had the result of the cost studies lower than the test showed the
663 cost to be. I was instrumental in that test. It was our president who finally approved the allowance, but the figures of the cost originated through my department except in the case of the Magnolia, which figure had already been established by the Southern Pacific, and we satisfied ourselves that we could not do the work for that price, so it was agreed that we would make the same 72 cent allowance (T. 6164–6166).

The matter of whether an allowance should be or should not be granted to the Magnolia Company was controlled, in the first instance, by the Southern Pacific, although we realized the legal right of that industry to ask reimbursement from our company for performing service on account of our company.

What I meant by the "trading of work" between the railroad and industry yardmasters is this: Our yardmaster had his crew and engine lined up to set the cars inside the plant and the yardmaster and crew of the refinery had their work lined up so that perhaps in those two line-ups there would be some interference if they carried them out the way they had them lined up, so they would get together and work it out among themselves in a sort of reciprocal way to perform the service in a most satisfactory manner. To a limited extent, our crew would do the plant switching, and the plant crew would do what is regarded as carrier service. I don't mean that our crew would go in and do all the plant service, but both crews so lined up their work that they could both operate to advantage, and if one of them would move one car for the other fellow, maybe the next day the other fellow would move a car for him. We

permitted that, because it was to the advantage to us and the refinery for them to work together in that fashion.

664 We made no charge for performing a plant service, we merely offset it against what they did for us. I would not say that we cancelled out our tariff. I don't think it would be permissible for our company in doing plant service for one of those shippers to offset the compensation against the service they performed for us. I think you would have to charge the tariff rate, at all times, and I don't have any doubt but what that was done; but certainly you need cooperation in a place like that or you wouldn't get very far (T. 6166–6167).

As to whether, at a plant that has quite an interior track layout within its plant, all of which was constructed and maintained by the railroad; and our company also serves the same plant, which also grants an allowance to the plant for performing service over the track; and in order to meet that competition—we would bear a part of the expense of the construction, investment, and maintenance of our competitor's track—I would say no, because if one railroad carrier owns the tracks in a plant and did the switching I am afraid they wouldn't have much competition in that plant.

As to whether, conditions at the Magnolia plant—that is—the Kansas City Southern met the competition of the Southern Pacific—this practice would extend to other refineries—generally speaking we handle those industries on a similar basis. It is a good deal like paying a switchman $1 an hour in one instance and $1.25 to the man right alongside of him; you have got to equalize or else, and I cannot conceive of the Magnolia or any large plant of that kind that would call on the carrier to furnish the tracks and do the

665 maintenance and do the switching. It is true the Southern Pacific made this trade first with the Magnolia, but if the thing had been reversed and the Magnolia had taken us on first I expect we would have been relieved (T. 6166–6169).

The reason we don't bear the actual cost rather than some under cost—it was the best bargain we could make, and we agreed on a price that we were willing to accept and we were willing to pay.

The cost figures, if you will look them over, rather indicate a fairly uniform cost. To begin with it is a pretty good talking point to say that 90 cents is the allowance over at the Texas plant and 90 cents is the allowance over at the Gulf plant—why should we pay more? On the other hand, the gentleman would say—"Well, I should be paid as much", so that is to some extent the reason the uniform 90 cents applies. The cost studies are authentic. They are made to the best of our ability.

It is true, that at one place we will find that our industrial cost is as high as $1.22, and the plant gets 90 cents, and at some other refinery it is around $1 and the industry gets 90 cents. If our so-called bargain had been a certain percentage below cost—it would have been giving each refinery the same thing; but we didn't do it that way—the percentage below cost plan. The mere fact that

we established it at 90 cents in one instance was perhaps the main consideration in the other instance as to what would be the proper allowance to one plant and what would be generally fair to the other. That is the way that trade was made.

I really think that the figures placed as the charge were agreeable to all parties (T. 6169–6171).

666 J. B. MATTHEWS, Superintendent of Transportation, St. Louis Southwestern Railway, was called as a witness, having been first duly sworn, testified as follows (Vol. 6, P. 6174):

DIRECT EXAMINATION

I am Superintendent of Transportation for the St. Louis Southwestern Railway and have been with the Cotton Belt ten years and in the railroad business twenty-four years. I have served in practically every end of the operating department.

I submit exhibits showing track lay-outs of five industries named by the Interstate Commerce Commission in this proceeding, as follows:

Exhibit A–124, the Gideon Anderson Company, operate a lumber mill and saw-mill at Gideon, Mo. There is located on the west side of the Cotton Belt main line at this point a track 1,365 feet long shown on the exhibit in dash yellow and dash red. This track is used as an interchange track between the St. Louis Southwestern Railway Company and the industry. The railway company places empties on this track and the industries cruise with their engine, take the empties off of this track, move to their yard, approximately 1 mile, where they are spotted on various tracks at various mills for loading. After the cars are loaded, the industry's engine moves those cars back to the interchange track and lines them up first out for the Cotton Belt trains to move. On account of the volume of switching involved in spotting the cars at various locations within the plant it is more economical for the railway company to make an allowance than it is for the Cotton Belt to perform this switching with its own trains. Furthermore, the Cotton Belt operates tri-weekly service on this section of the line and if the railway company switched the plant it would probably be necessary to operate

667 daily service. The trackage shown in green on the exhibit is that over which the industry performs the switching operations.

Exhibit A–125 is that of the Vail Donaldson Company located at Marmaduke, Ark. The same operations apply at this industry and the reason therefor as at that for the Anderson Company.

Exhibit A–126 is that of the Cotton Belt Gravel Company at Laird, Ark., which operates a gravel plant. While the Cotton Belt Railway has no connection and owns no stock in this industry, it does lease to that company the gravel land on a royalty basis. Gravel at this industry is loaded by a steam shovel. The Cotton Belt delivers empty cars on the 1,752 foot track, shown in yellow

on the exhibit, and the gravel company's engine spots the empty cars, a few at a time, to the steam shovel and then shoves the loaded cars back on the portion of the track shown in dash red and dash yellow where they are picked up by the railway company's engine. It would cost the railway company considerably more than the allowance made for performing this service (6174 to 6176).

Exhibit A–127 is the Bearden Gravel Company which operates a gravel plant in the vicinity of Bearden, Ark. The Cotton Belt Railway's engines operate over the trackage shown on the exhibit in red. The Cotton Belt delivers cars to this industry on the three most easterly tracks shown on the exhibit in yellow and the gravel company's engine places the loaded cars on the three most westerly tracks shown in yellow. In placing the loaded cars for the railway company to pick up the gravel company segregates the loads for movement north and those for movement south in order to save the railway company time. The gravel company, with its engine, moves the empty cars from the tracks referred to to their pit track, shown in green, and after loading several cars with their steam shovel places them on one of the three westerly tracks shown in yellow. It is also more economical to have the gravel company spot the empties, classify and place the loads on designated tracks than for the railway company to perform this service. Exhibit A–128 is that of the Meriwether Sand and Gravel Company, Inc., which operates a sand and gravel plant near Lewis, Ark. The railway company delivers the empty cars and the gravel company returns the loaded cars on a 1,005-foot siding near the Cotton Belt Railway's main line shown in yellow on the exhibit. In setting out the empties and picking up the loads, the Cotton Belt is permitted to operate 2,130 feet from the head block on the main line, shown in red on the exhibit. The gravel company moves the empty cars from the tracks shown in yellow to their washing plant and gravel pit after the cars have been loaded at the washing plant or gravel pit, the gravel company's engine returns the loaded cars back to the siding for the railway company to pick up. The gravel company's track is shown in green on the exhibit. It is also more economical for the gravel company to perform this service than for the railway company to perform it with its engines (6176 to 6178).

668

In years past the Cotton Belt Railway operated local freight trains in each direction over territories of 75 to 100 miles, which was necessary in order to perform station switching, industry switching, and largely for the delivery and receipt of less than carload merchandise. In recent years by reason of this less-than-carload merchandise having gone to the highways, thereby leaving for the locals only station switching and industry switching, locals were first reduced to alternate day operation and their territories increased under contracts with the unions, a maximum economical operation of 125 miles. A year or so ago (about 1930 or 1931) the Cotton Belt, by reason of the light industrial and station switching practically eliminated all local freight trains, having its through freight trains, on days when

necessary, perform the industrial and station switching.
669 In performing this switching, the through trains by reason of their long territories are on duty long hours, and for them to perform industrial switching would require them to move very slowly over industrial tracks by reason of class of construction of such tracks, particularly gravel plant tracks. For the railroad company to operate over these tracks it would necessitate restoration of local freight trains because territories of through freight trains can not be reduced. In other words, the railway company would have to incur an additional expense for stand-by service.

Generally speaking, tracks of industries, particularly where considerable trackage is required, is of light rail without ballast, excessive spacing of ties as well as sharp curvature. Tracks serving gravel plants are of the same construction, as a general rule, except they are laid entirely on the ground for the reason that it is necessary from time-to-time to shift the tracks with crow bars in order to reach a new gravel pit. Such track, while not considered dangerous to operate there over, are such as to require engines of a very low rate of speed, which greatly increases the amount of time required to switch such plants and greatly increases the cost of operation.

Exhibits A–124 to 128 were received in evidence, and marked "Carrier's exhibits, witness Matthews."

670 CROSS-EXAMINATION

It is my understanding that the Cotton Belt has never performed switching service on the tracks of the industrial plants. This has been due to the practice up to two years ago or so for these industries to perform this switching for their own convenience and also for the convenience of the carrier. There was no allowance made at that time. The Cotton Belt has always considered it a part of their common carrier service to place the cars in a position accessible for loading and unloading on the tracks at these industries.

When I said the volume of switching involved in spotting the cars at various locations in the plant is more economical for the railway company at the Anderson Company plant—is for the reason of the various loading tracks within that industrial plant. Different characters of materials are loaded on different tracks. In this particular case in order to reach the band mill, which is at the extreme right on the exhibit, it would be necessary for us to use a portion of the Frisco's main line over which this exhibit shows the industry has trackage rights, but I doubt if the Frisco would give us those rights. It would not be possible for us to switch this plant unless the Frisco gave us the right to use their main line. We can switch all of the tracks at this industry except this band mill track to which the allowance applies.

The tracks on which we deliver cars to the industry are our own tracks. If we were called upon to switch this plant, so far as the physical condition of the tracks are concerned, we could do it,

because the locomotive operated by the Anderson Company is approximately the same size as that operated by that branch. However, should we perform the switching the industry would re-
671 quire daily switching, whereas we have tri-weekly service and it would be necessary to put on another local for the exclusive use of switching this plant (6179–6182).

I am not famaliar with the physical condition of the tracks at the Donaldson Company plant and couldn't say whether we could or could not operate there over. I understand that track is laid with 35-pound rail, which, if true, we could not operate over.

We deliver cars to the Cotton Belt Gravel Company on the 692 foot track marked in yellow on Exhibit A–126. The track is the property of the gravel company. The railroad owns the land from which gravel is removed. The gravel company moves the cars from the interchange track and returns the cars to the same tracks after loading, where the railway company picks them up. The railroad company delivers the empties at a different point than where the loaded cars are picked up. In loading cars with a steam shovel they can spot a couple of cars and load them and move the steam shovel and then set up more cars to be loaded. It is necessary to move both the cars and the shovel because when they get all of the gravel out of one place they have to move to a new location. That is the basis of my statement, why the track is laid on top of the ground. If we were to switch this plant it would be necessary to keep an engine there to switch the cars under the steam shovel as required by the industry.

We can operate over the tracks of this industry—they are 75-pound rail—but at a very low speed because of the fact they are laid on top of the ground with tie spacing not standard. It would take longer, and the longer you take the greater the cost of the operation.

This gravel plant has not been in operation for 17 months. We could switch this plant if necessary—I mean if they did not
672 provide their own switching we would have to do it. However, this would call for stand-by service, because their operations are similar to other gravel plant operations. They have to have an engine there constantly to spot the empty cars under the steam shovel and move the loads (6182–6185).

At the Meriwether Sand and Gravel Company (Exhibit A–128) the empty cars are placed for loading on what is shown on the blueprint in yellow as a passing track and the loaded cars are placed at the same point. The Cotton Belt Railway is permitted to operate 2,150 feet from the head block on the main line, or the portion shown in red on the blueprint, because this entire track is the property of the gravel company and they give the right to operate over only that portion in order to reach this track upon which we deliver the empties and receive the loads. I could not say that the industry would permit us to go into the plant and perform the

spotting service, but I assume they would if they did not elect to perform the service themselves. We would also have to perform stand-by service at this plant. All of these plants are served by road engines. We have no switch engines at any of these plants. Possibly our operations are different from those of other sand and gravel companies. We are doing things now that were entirely impracticable three or four years ago by reason of the radically changed conditions (6185–6186).

673 C. E. PERKINS, Vice President, Missouri Pacific Railway Company, was called as a witness, and having been duly sworn, testified as follows (Vol. 6, p. 6324):

DIRECT EXAMINATION

I am vice president of the Missouri Pacific Railroad, and its several subsidiaries. I am in charge of traffic.

As to the allowances to lumber companies, we followed the Commission's decision in I. & S. 11, the Tap Line case, and we tried to and we did make, as I recall it, in practically all cases our allowance in so far as lumber was concerned strictly in accordance with the principles laid down in the Tap Line decision. We did not, generally speaking, make any allowances, however, with respect to rough material rates. Rough material rates are only made over our own line and not in connection with any other line. We took the position on the rough material rates that no allowances or divisions should be allowed; in other words, the Commission in the Tap Line case fixed certain divisions to the tap lines for certain distances, and where the distances were under the mileage for which divisions should be allowed then it reverted to a switching allowance, and we took the position that as we made no division on rough material rates that we would make no switching allowance on rough material rates. The rates were very low, and, as I say, we never applied them beyond our own rails. I might say we have had a good deal of controversy on that subject with a number of the mills at that time and following, but we have attempted to follow the policy of making our rough material rates without any allowance for either switching or for a division of any kind. We always have, of course taken

674 the position that it is our duty to switch the cars to and from the industry where we serve the industry, but with respect to those rough material rates, we have tried to follow the policy that where we do the work ourselves, we hold out to the shippers that we will deliver the rough material into their plant. That depends, however, on our ability or disability to enter in and upon the private tracks with our own power, and reach the spot where the traffic is to be located for loading or unloading. Where because of the condition of the track—weigh of rail, curvature, maintenance of roadbed, or whatnot—we cannot enter the plant, we hold

ourselves ready to perform the service provided they put the track in proper shape for us to perform the service. But if our power cannot operate over those tracks then naturally we have to quit right there (6326–27).

A great many of these plants have no means of performing the service on rough material, and we take that material in and deliver it to them. The reason we would do that rather than pay an allowance is that ordinarily the rough material, consisting generally of logs, moves in in rather large quantities and we feel that we can go in and do that work ourselves rather than make the allowance.

As to whether the industry can perform this service cheaper than the railroad—I don't think that is so in so far as the allowances to lumber companies are concerned. The Commission fixed the allowances, and we simply made the allowance regardless of what the cost. That was very different from any other allowance of that character (6327–28).

In some cases I think the carrier could perform this service cheaper than the amount of the allowance paid to the industries. These payments are being made simply because it is a practice that you might say was laid down for us by the Commission. The
675 Commission said that we were privileged to do so naturally everybody stepped in and did it. In a good many cases perhaps the sawmills can perform the work cheaper than the railroads.

The payment of allowances on rough material is more of a policy than anything else, because we could not start making these allowances without at the same time being obliged to absorb connecting lines' switching. As I stated in the beginning, we do not absorb any connecting line switching on rough material—we do on finished lumber. We felt that the only safe plan was on our rough material to do the work ourselves where we had to and stand the consequences, rather than to open up the question of absorbing switching charges, which would involve us in the connecting lines' switching charges. We have a lumber mill located on our line, for instance, that has its own tracks and its own power, but it is not incorporated as a common carrier. That lumber mill with its own power brings lumber cars over its line to our track, for which we give it the same allowance which we accord as a division to the common tap line carrier; i. e. $4.05. That is for the purpose of equalizing the mills located some distance off our right of way with the mills located on our line (6338–6330).

In one case the rate application on the finished product from the mill is a rate group, what we speak of as the yellow pine group, and the rates apply from the mills whether they are located upon a tap line, or whether they are located on a trunk line. And that results in the allowance that were approved with some limitations by the Commission in docket I. & S. 11; but the Commission never authorized an allowance, or required an allowance to be made under the low rates on rough materials inbound or outbound (6331).

676 Now, getting away from the lumber allowance, and the allowances we made following out I. & S. 11, our general policy is that a railroad serving the industry on its railroad—it is assumed to do the switching to or from the industry on its own railroad, and as far as it is practicable we do that switching ourselves. There are cases—not many, but there are cases—where the industry does the switching and an allowance is made to them in the regular way. Those cases are all handled on their merits, each individual case handled on its merits.

In the western trunk line territory there has been machinery set up to especially handle those propositions, and the lines operating in western trunk line territory, after they have made their own investigation and feel that an allowance is justified, refer it to that committee and they pass on it. They may recommend for or against. If they approve it, why, it stands approved and the allowance is published in tariff form. If this committee should for any reason think that it should not be done, then it goes back to the individual road and they decide what they will do with it. In other words, this committee is really a conference committee in which we talk things over, and if they say yes, all right, and if they say no, all right, we still have got the right to go ahead and do it, if we think best. In the end the individual line's judgment must prevail in the matter (6332).

677 W. J. O'BRIEN, General Manager, Chicago River & Indiana R. R., was called as a witness having been first duly sworn, testified as follows (Vol. 8, p. 8498):

DIRECT EXAMINATION

In regard to the service afforded by the Chicago River & Indiana as the joint agent for all the carriers: The Chicago River & Indiana Railroad has done the joint switching work at this plant (of Crane Company at Chicago, Ill.) I think ever since it was built, ten or twelve years or more ago. In the beginning it was found best for all to have our engine do the work at night, of pulling and resetting the plant tracks, the cars being received from the five railroads that have access to the plant at various times during the day, and we took our own cars out with us in the evening. That work at that time was quite heavy; now it does not take even the full time of one engine assignment. But we come in the evening and do whatever is required in the way of pulling and setting cars. That service is paid for on a car basis, the actual number of cars handled by the crew being reported by the conductor, and the hours consumed in performing the service are the basis for the charge on an engine hour basis, divided among the railroads for which the service is performed.

The inbound carriers, line haul carriers, bring in the cars and place them on a series of tracks in the southwest corner of the

plant, and the plant with its own power takes those cars from those series of tracks, over the scale track, and places them on the northwest series of tracks—from which tracks our engine, during the night, takes and spots the cars within the plant.

After those cars had been unloaded, or empty cars taken in and spotted to be loaded, the plant engine takes those cars from the point of unloading or loading, as the case may be, and brings them back to this series of joint tracks at the southwest corner of the plant—but they do not handle all of them—we handle some
678 of the loads and empties, and the plant engine handles some of them. The cars that they would handle, would be those that would require handling during the period of the day when our engine would not be there. The plant engine may be handling all of the cars within the plant today, because the volume is light, that is, the plant engine could take all of the empty cars and all of the loaded cars from within the plant and place them on the interchange track.

The reason that they have their plant engine move some of those cars is that they want the actual weights on the loaded cars and the empty cars for their own information, rather than leave them on the interchange track, where they are placed by the line-haul carriers. If they waited for us to perform that, it might delay their handling; and again, they would have to pay us an additional charge for our services. If they can perform the service with their own engine with advantage to themselves, expediting the handling of the cars, it is only common sense to do it, as long as the industry available, and use it in the conduct of their business (T. 8498-8500). It is a plant convenience. Whether it is a determining factor or not, I can not say, but it certainly is an advantage to have those cars weighed, and possibly samples taken of the pig iron, or whatever the commodity is, and then they know just where they want to set it, and whether or not it is fit to use. The industry performs the service. Whether it is for their convenience or not, they would have to answer.

From the storage yard where our engine picks up the cars for distribution, our engine is required to classify those cars, drill them out and put them in the order of the spots at which they are to be distributed.

The switching of this plant is a very simple performance. There is nothing complicated about the switching at all. My view of
679 simple switch is where the turn outs are in what I would call a continuous movement, and the curvature is not severe, and there being no obstructions in the way of overhead or side clearances that would block the work of the crew. I can not conceive of anything difficult about that performance. It is just ordinary work, routine handling of cars with an engine crew. That is my definition. I do not know what you gentlemen mean when you speak of a simple switch.

The interference referred to by one of the foregoing witnesses, was interference by reason of the bridges from one platform to an-

other, which would require the stopping of the work of the employees in the loading and unloading of cars, and removal of the bridges before cars could be distributed with the engine. That is true everywhere that cars are spotted and men are working on them. You can not pull a track without first getting all of the men out of the cars, removing the bridges between the platforms and possibly taking down some of the load in the car to make it safe to handle. There is considerable involved in pulling and setting a track, and I think that is the interference that the plant yardmaster had reference to, and they are true. That interference would apply against any locomotive that undertook to do the switching, whether it be the plant locomotive or the carrier locomotive. Our men do not find that trouble at night (T. 8500–8504).

The handling of the plant work by one engine jointly for several carriers is still a simple switch. If it were handled individually, there would be interference, unless by some process schedules could be arranged to avoid interference. So far as the physical conditions are concerned, it is still a simple switch. The performance is a question of management, supervision, and direction. If the power of the railroad in undertaking to perform the spotting service was delayed seriously, was interrupted in the process of its
680 work so that the burden of time fell more heavily upon the railroad than it ordinarily would in spotting cars on other tracks, or at a team track, I think I would regard it as a simple switch. It is a matter for correction. Where we encounter such a condition we make every effort to get the industry to remove that condition which brings about the interference, or the delay to our engine. We even go to the extent of doing the work at night as at this industry, and we invariably get cooperation from the industry to make our operation more efficient (T. 8504–8506).

Our treatment of industries, based upon the question of whether they are simple or non-simple—in terms of service, all industries look alike to me, and I endeavor to furnish them good service. We have a yard at 40th and Wallace St., where there are 5 team tracks. The aggregate capacity is about 52 cars. This team track has an approach from an elevation which makes it just a little more difficult on that account; but it would probably take 2 or 3 hours to pull and set each of those tracks, setting out empties and replacing loaded cars and making the separations. We aim to keep the cars of certain commodities where it will be most convenient and best adapted for the party unloading it. I do not simply place the cars at random, regardless of whom they are for, or what they contain. Meat shipments are kept removed from where coal and hay are unloaded to avoid the dust. That is not done simply for our own convenience, and our own profit, but for the benefit of the consignee. At times we have to take out partial empties in order to replace loaded cars behind them. The yard is fenced in, and locked, at night, but we have a patrolman visit that yard at least twice every night, to protect partially unloaded cars. We own that team track,

and it is an investment on which we might be entitled to a return. We have no investment in the Crane Company plant.

681 We have private side tracks that serve industries in Chicago, that are short and single tracks, and at those industries we place and remove cars with our engines. Our road serves several plumbing companies in Chicago, and we place loads at points where the cars are unloaded and remove the empties or take out loaded cars. There is nothing exceptional in our treatment in any of these plumbing goods houses. I have never heard the term "simple switching service" used among railroad men. The team track at 40th & Wallace Street is switching at the present time during the daytime; when the place is busy we do the switching at night in order not to disturb the loading and unloading. The amount of cars in or out of a plant I would not think would be determinative of whether or not it was a simple switch (T. 8506–8513).

682 E. B. Boyd, Chairman, Western Trunk Line Committee, was called as a witness and, having been duly sworn, testified as follows (Vol. 8, p. 8580):

DIRECT EXAMINATION

I am chairman of the Western Trunk Line Committee and have occupied that official position 18 years. I am also an officer of the Western Trunk Line Allowance Committee, which is a sub-committee within the Western Trunk Line Association. I have been chairman of that sub-committee about three or four years. It was created in December 1923 with the purpose and object of maintaining "contact with the special committee of the Central Freight Association, which was making a comprehensive study of the terminal allowance situation, and working to the end of not only clearly defining the responsibilities of the carriers, before entering into any arrangements, but also working with the Interstate Commerce Commission for the purpose of insuring correctness of tariffs, contracts to be filed, etc." A conference was held with the Central Freight Association special committee in February or March 1924, at which time there was furnished the Western Committee copy of the formula under which the first mentioned committee was working in compiling data with respect to cost studies, etc., of industrial roads performing switching service. The following action was taken:

"It is therefore the recommendation of this committee that the question of interchange should be determined by concerted action not only with the Executive Officers of the Eastern Trunk Lines but also with the carriers operating in territories other than the Western Trunk Line and Eastern Trunk Line territories. And it is further recommended that this question be referred by the Western Trunk Line Committee to the Chairman of the Western Traffic Executive Committee for consideration and determination as to procedure with other like bodies for the adjudication of the entire problem" (8681–82).

683 Following action by the various interested committees, on April 15, 1925, a joint conference of the Central Freight Association lines was held, at which time it was expressed by a joint committee that "a joint course should be adopted so that all lines may act in harmony on fundamental principles established by the Interstate Commerce Commission and logical methods substantially as formulated by the Eastern Committee, joint meetings between the Western and Eastern Committees for that purpose to be held from time to time when necessary." Modifications have been made in the formulas of the Eastern and Western lines, and their formulas are substantially the same. I have given a brief history of the formation and operation of the terminal allowance committee of the Western Trunk Lines (8583).

The procedure in which applications are handled for terminal allowances in western trunk line territory is as follows: The application of shippers is first submitted to the lines serving the industrial plant. Such lines desiring to proceed further, the application is then sent to the Chairman of the Western Trunk Line Committee, who also serves as Chairman of the Terminal Allowance Committee. The application is then sent to a committee of lines serving the plant, and also a neutral member of some railroad in the same vicinity who might be indirectly interested for competitive reasons. That committee in connection with its operating officials makes a preliminary investigation to develop whether the railroad can operate to and from and within the plant, what the physical conditions are, etc., following which it makes its recommendation. Report showing all the circumstances is then sent to a committee of counsel, who will pass upon the question of whether, in view of all the circumstances outlined in the preliminary report of the operating committee such allowances can lawfully be made. If the Com-
684 mittee of counsel declines to approve the proponent line is so notified. Should the committee decide the terminal allowance would be lawful, the subject is then referred to a committee of accountants, which conducts a cost study as to the operation of the industrial switching line, both within the plant and to and from points of interchange with the carrier. The report is then sent to the terminal allowance committee, and if the majority of that body approve the allowance, the lines are free to proceed accordingly. Should they disprove it, that closes the subject so far as the terminal allowance committee is concerned. If the proponent lines decide that regardless of the opinion of the terminal allowance committee it is to their interest to make the allowance, they have that right by giving individual notice to the members of the terminal allowance commitee, who will promulgate it to the members of the Western Trunk Line Committee. That is the history of the form of procedure which has been followed (8584–85).

The definite rules or principles used in determining when an allowance should be granted and when denied, the grounds for granting, and the grounds for denying are all covered by a committee of oper-

ating officials and accountants which determines all those facts before we act on it. You are not to understand by that that the operating officers of the applicant line first determine the question. We appoint our committees according to the applications, confining the committee in its membership to those lines directly interested, and others if they are involved in contiguous territory. That committee makes its recommendation, or its investigation, and a report as to the operating conditions. Then counsel study the legal features of it, and if all right, the accountants make a study. Now we have all the facts before us, and based upon that we determine whether the al-
685 lowance should be made. No other consideration that I am informed of has been given except as a matter of judgment as to whether they will do or will not do what the applicants request (8585).

Allowances are not restricted to industries engaged in a particular line of business by any rule of the committee, or of the Western Trunk Line Association. We have other lines of industry besides iron and steel. There is no restriction. Any applicant will have his application or petition considered regardless of the line of industry (8585).

I could not answer as to whether the amounts of the allowances as finally determined are calculated upon the costs of any particular year. Whether or not the carrier's power can enter the industrial plants is determined by the engineering committee. I presume they determine such considerations as the track layout—the curvature, but I am not an engineer, and not a member of the committee, and do not know what they do. They are instructed by the Western Trunk Line to go into all the facts as to whether the railroad can operate there within the plant. What those facts are is for them to determine (8586).

In an instance where it was found impossible because of some physical obstacle such as weight of the rail, curvature of the track, crossovers, or turnouts, or whatnot—where it was found impossible for the carrier's power to perform the service they would deny the allowance.

The object of the Committee as I stated is to establish uniform practices in considering and acting on the different applications and they will not act upon them without all the facts before them, and I suppose and presume they will give due consideration to any discriminatory features that may be developed (8586–7).

686 Q. Were there any representations made to you as Chairman of the Committee, or before you were appointed Chairman of the Committee, to the effect that there did exist inequalities and discriminations in making allowances in either your territory or in Central territory (8599)?

A. Well, I do not recall any such. However, there may have been.

Q. What I had in mind was, and the question was, whether such representations had been made, or you had known of any discriminations or inequalities that existed.

A. I do not know of any particular ones.

Q. And you did not, at the time the committee was created?

A. I did not.

Q. Now, are the recommendations of the committee in any way binding upon the carriers, carrier members, or may they depart from those recommendations, according as their judgment seems to justify?

A. The right of individual action is always preserved. We hope that we can, by discussion in the committee, and by action of the majority, prevail upon the proponent to act in harmony therewith. But as I have stated in the statement that I read, if a line feels that it is to their interest to make an allowance, regardless of the study, we cannot stop them (8588).

Q. Are there any instances within your knowledge where the member lines of your organization have not followed the recommendations of the committee, against making the allowances (8588–8589)?

A. I could not answer prior to the time I took the Chairmanship. There were a number of applicants—a number of applications disposed of before that time. I know of one or two instances where the subject was reviewed by the Executive Committee, and they did not concur, where individual notice was given (8589).

Q. Well, do you know whether the Western Trunk Lines are generally observing the recommendations of the committee in these matters?

A. I would say, yes, as far as my knowledge goes, in most all of the cases. There are very few, only one or two, that I know of, where individual notice has been given, as far as my own connection
687 with the committee goes. I cannot go back of that (8589).

Q. Does the inquiry or consideration by your committee reach beyond the question of allowances, to instances where, instead of an allowance being given, service is rendered by the railroad?

A. Do I understand from that, you mean, where we decline the allowance, and perform the service in lieu thereof?

Q. No. We have had some testimony of record indicating that at certain industries the railroads are performing the service with their own power.

A. Yes?

Q. Under circumstances that seem to be somewhat similar to instances where at other industries the service is being performed by the industrial engines, and in some cases the industries are not receiving allowances, and in other instances they are receiving allowances (8589).

A. I think there are cases of that kind. Each one of these allowances is determined on its own merits, regardless of the practice concerning another industry (8589).

Q. But my question was whether the committee in its action on these matters reaches beyond instances where there is an application for an allowance, and looks to see whether the carrier is performing service with its own power, for which an allowance would be denied if applied for (8589).

688 A. Our committee does not necessarily reach beyond instances where there is an application for an allowance and look to see whether the carrier is performing the service with its own power, in which case an allowance would be denied if applied for. If it appears from the study that the cost of the service to the carrier in performing the work by its own power is greater than it would be performed for by the Terminal Association, they follow generally the latter plan if it is lawful and warranted. I do not know of any rules that we follow other than the rule I have mentioned. I do not know of any undertaking on the part of the Western Trunk lines to embody any specific rules or regulations to govern this matter of allowances aside from publishing the authorized allowances. I do not publish tariffs—the individual roads do, and I never check them up (8590).

The rules already of record, identified as Exhibit 264, put in by Witness Vivian, a document that describes the rules governing the method of procedure in these matters of terminal allowances, signed by myself, are the rules promulgated or adopted by our committee. They are the rules for preliminary investigation by the operating committees, and information required of them. I cannot give you the date of the rules (8591).

(Statement quoted from paragraph 3 of Exhibit 264 under "Interchange service"):

"The Interstate Commerce Commission has held that switching services by a plant facility for account of a carrier must not exceed the equivalent of a team track or simple switching placement. If no unusual or marked difficulty of operation in a plant is presented the service may be considered not in excess of a simple switch. Any service in addition to that shall be at the expense of the industry" (8592-93).

689 Now with reference to the statement quoted, and your question as to whether it is left to my committee, or some subcommittee, or the engineers, or whom, to determine that particular question—that is an engineering and operating question. It is the joint work of these three committees. All I know about the factors they judge by is that the formula is set out for the guidance of these committees in their work (8593).

Giving my attention to page 5 of the same section—to what is identified as paragraph 18, the statement you have read, as follows: "Service which the industry performs for the carrier for which payment is made is the uninterrupted movement of cars between designated interchange tracks and points of loading or unloading", as to your question with reference to it, whether in following and applying the interpretation or descriptions of interruptions and interferences outlined, and whether carriers are restricted to instances where it becomes necessary for the locomotives to cut loose from the cars to do some industrial work before its spotting—I cannot say that. We leave that entirely to the operating and engineering depart-

ments, and they base, I assume, all of their conclusions upon these various factors taken into consideration, and their recommendation is what we take as a whole. We do not go into the details; we know nothing about it as far as the details are concerned. Their recommendation is what we go by. We have a copy in our files of all those reports. We do not act on the report at all as a traffic committee until the law committee has passed upon the preliminary report. The first page you refer to here gives the line of information that the committee wants, and if they say it cannot lawfully be done
690 that ends it so far as our committee is concerned, unless some line insists on a cost study—and they can make it themselves—we cannot stop them (8592–94).

Within my knowledge there is no express definition, by which our committee is guided or by which our sub-committee may be guided—of a simple switch as compared with a more complicated switch, or service. That question has never been discussed to my knowledge—that is a matter for the operating department to determine—what a simple switch is. They know, and we do not (8595).

Bearing in mind my oral explanation and matters set forth in exhibit 264, you are to understand that before an application for a spotting allowance is granted, it has to get by a committee of operating men, a committee of cost accountants, a committee of lawyers, before it comes to my committee which is composed of traffic men. We have no procedure other than we have outlined.

The object of this procedure was to obtain uniformity so that all allowances would follow some definite plan when they were granted and my experience is that they are determined on merit (8596).

691 G. H. VIVIAN, called as a witness, having been duly sworn, testified as follows (Volume 8, page 8601):

I am a member of the accounting section of the Terminal Allowance Committee of the western roads (8601).

Director BARTEL. When these matters come before the Accounting Committee, of which you are a member, is there any consideration given to the—or, rather, is there any report made by operating officials who have investigated the operations within the plant, as to whether or not the service for which an allowance is proposed, is the equivalent of a team track or simply switching placement (8603).

A. Not directly.

Q. Well——

A. The formula provides for the equivalent of a simple switch. It is the duty of each operating man to determine whether or not there are obstructions in the plant that would prohibit the operation of that plant, or part of it; whether there are undue complications in the switching of the plant. All of those facts are supposed

to be incorporated in the report that is rendered, as is indicated in exhibit 264 (8603).

Q. Did you hear the testimony of some of the operating officials who testified today that they never heard of a simple switch (8603–4)?

A. No, I did not hear it; I was not here all day.

Q. Well, the testimony of Mr. O'Brien, I think, of the Belt Railway was—he said he never heard of a definition of a simple switch, and never heard of any such thing as that.

Mr. BURCHMORE. He said the term was not used.

Dir. BARTEL. Well, it is used in the formula, and I am just asking him whether they get any report from any operating officer with respect to what they regard as a simple switch placement.

The WITNESS. Well, I do not believe that a simple switch, as it is used in the formula, can be interpreted as anything of a definite character. I think that the term "simple switch" is a relative
692 proposition only; it is a relative term. There are many degrees of simple switching if you want to term simple switches (8604).

By Mr. HAGERTY:

Q. Are we to understand by that, Mr. Vivian, that in your judgment that question is something that must be determined as a local matter in connection with each industry?

A. Yes, sir.

Q. And that no definite inflexible rule of thumb can be applied to it so that it would cover all of the industries everywhere?

A. That is my opinion.

Q. That is your judgment?

A. Yes, sir (8604).

With reference to Rule 18 in our formula, Exhibit No. 264, if a plant performing spotting service and receiving an allowance has a car weighed on its own plant scales, the time from the interchange to the scales is interchange service and chargeable to the railroad. The time of scaling the car and its subsequent movement, if the car is within the tolerance limit, or the car is weighed for convenience of the plant, is plant service both portions being charged to the plant; the weigh in that case also going to the plant (8605).

In our various studies that we have conducted under these rules; we have not taken into consideration the location of the scale. It may be almost at the end of the interchange track. We have taken it on the basis that the type of car and the type of weighing is the governing factor, and if the weighing of the car is for the convenience of the plant, that is a plant interruption or interference that occurs at the scale, and the balance of the move is chargeable to the plant (8605).

By Dir. BARTEL:

Q. Well, I understand here that this allowance is gra'ted on the theory that it is the carriers' obligation to move the car to the point

of loading or unloading. Now, my question is—of course,
693 if the shipper interrupts the movement of the car on the interchange track, and says that is where he wants the cars placed, does the carriers' obligation under the rules for determining the allowance go beyond that point (8607)?

A. Well, that is true, whether the car is to be weighed, or finally spotted, as I understand it. I am not qualified to answer a legal question, but——

Q. Well, I do not mean——

A. But from the standpoint of operation, the carrier is supposed to spot cars (8607).

694 EUGENE MORRIS, Chairman, Central Freight Association, called as witness, having been duly sworn, testified as follows (Vol. 8, p. 8613):

DIRECT EXAMINATION

I am Chairman, Central Freight Association. Have occupied that position 20 years or more. I am acquainted to a certain extent with the consideration that has been given from time to time by the association lines on this question of making allowances to the industries for the performance of terminal services. Our committee's studies were initiated about 1914 or 1915 for the purpose of supervising the allowances made account of plant facility operations. That committee does not operate under instructions received from any other committee and does not have any particular rules or regulations. The members were appointed by the General Committee and approved by the Executive Committee. The General Committee consists of traffic managers of the carriers in the territory. We call ourselves in Central Freight Association territory the General Committee and in Trunk Line Association territory they have a Freight Traffic Managers' Committee which is practically equivalent to our General Committee.

695 The committee which has supervision over terminal allowance work is the Terminal Allowance Committee of the Central Freight Association Lines, and then in eastern territory we have what we call the *the* Accounting Committee that handles terminal allowances. These committees were appointed by what we call the General Committee in Central Freight Association Territory and they have what they call a Freight Traffic Managers' Committee in Trunk Line Association territory, which is equivalent practically to our general committee (8614).

Q. Now, this Terminal Allowance Committee that you speak of, of the Central Freight Association Lines, is that committee to which applications for allowances are referred?

A. Yes, sir. The carriers that reach the plant, they file an application, or the plant itself may file an application some times, and that application, if it is filed by the plant, is referred to the carriers reaching the plant, and those carriers then formulate an application

which is sent to us, and we place it in the hands of the Terminal Allowance Committee and that Terminal Allowance Committee analyzes the proposition, and if they find nothing objectionable, it is sent to the accounting committee on Terminal Allowances to make the study. That committee makes the study through its representative. Mr. Linegruber, of the New York Central at Cleveland, is usually the man who has supervision over the detailed study. He goes to the plant, and he goes to the representative of the carriers that reach the plant, such as the superintendent or assistant superintendent, whoever is proper, and makes the necessary arrangement for the study, that is for the men to ride the engine and keep the records of what the operation is (8615). And then Mr. Linegrumber makes his report to the chairman of the accounting committee on terminal allowances, who is Mr. Wagner of the New York Central at New York. They get all of the details collated, and after analyzing them they make their report to the chairman of the organization from whom they received the request to make the study. The
696 results are then placed before the C. F. A. Terminal Allowance Committee, and the report of that committee is then submitted to the C. F. A. general committee, and if the general committee members have no objection to the recommendation of the Terminal Allowance Committee, it is placed before the traffic executive committee for final action (8616).

697 The purpose of the procedure which I have outlined is to determine whether or not it is economical for the industry, or most economical for the industry for the road haul carriers to perform the service. One of the major purposes of the committee is to bring about a uniform method of treating these applications for allowances, or the making of the allowance. Another is to remove or prevent any inequalities or discriminations. Our work which began in 1914 or 1915 is still continued, although it was interrupted by Federal control (p. 8616).

Answering your question as to which of the committees mentioned would determine or rule as to what industries might receive an allowance:

The Eastern Traffic Executive Association has laid down the rule that iron and steel industries will be accorded an allowance on the 1915–1916 costs. Then when it comes to other industries receiving an allowance, it is in the hands of the respective traffic executive committees to determine that; that is, there is the traffic executive
698 committee in C. F. A. territory, there is the traffic executive committee in Trunk Line Association territory, and then there is an Eastern Traffic Executive Association that spans the entire territory, that is, Official territory. The Eastern Traffic Executive Committee laid down the principle that iron and steel industries should receive an allowance on the 1915–1916 basis of cost, and that whether or not any other industry should receive allowances is in the hands of the respective traffic executive committees in each territory to determine for themselves.

Our executive committee has the right to determine whether or not an iron or steel industry shall receive an allowance and, if so, whether they shall receive an allowance in harmony with the report made by the accounting committee. We are restricted to the allowance on the basis of the 1915–1916 costs because the major number of the iron and steel industries in our eastern territory are on that cost basis. Now, if there is to be any departure from that adopted rule, and allowances made to industries other than iron and steel or to iron and steel industries on the basis of current costs, it does not pass out of our hands (p. 8617). We have just the same problem there as we have with the iron and steel industries with this one exception. The Terminal Allowance Committee having the action of the Eastern Traffic Executive Association that it is only iron and steel industries that are to receive allowances, leaves it to the executive committee to determine whether or not any other industry that may make application shall receive an allowance. The question of whether or not that industry should have an allowance must be passed upon first by the executive committee before we proceed with our usual cost study. That committee has entire power to say whether or not we shall instruct that the cost study be made
699 or whether it will be denied an allowance based upon any information the committee may be furnished.

In my jurisdiction, in the Central Freight Association Lines, where some iron and steel industries are receiving allowances on basis of the 1915–1916 costs, I believe there are one or two cases where iron and steel industries are receiving allowances on basis of current costs, but I think the particular cases I have in mind were not passed on by the committee but were made by the carrier reaching the plant without the approval of the committee. There may be another case where there was a compromise and the allowance slightly departed from the 1915–1916 basis. You are not to understand that the uniformity that these committees have been seeking to establish has failed in those particulars that are mentioned, because the one case I have in mine the committee did not pass on the allowance. One or two exceptions does not mean that the rule has not been carried out generally (pp. 8618 and 8619).

I have in mind that there are only two or three industries within the Chicago district that receive allowances based on the maximum figure that is ascertained under the current day costs, but we have to consult the files to be accurate. The Youngstown Sheet & Tube Company in the Gary District is one of them. The only reason for the railroads that served these particular industries taking independent action was that the carrier felt that it could not justify restricting those companies to the 1915–1916 basis when the current costs exceeded that basis (p. 8620).

Our committee from time to time has conferred with eastern trunk line representatives and discussed the procedure in connection with the ascertaining of costs and the making of allowances. When it comes to carriers in the vicinity, or industries in the vicinity of the

western termini of the eastern trunk lines, uniformity is necessary and we undertake to get it; in fact, with those few
700 exceptions mentioned, there is uniformity as to the iron and steel industries in official territories. There is not uniformity with reference to other industries. The eastern trunk lines, as a rule, do not make any allowances to other than iron and steel industries. In Central Freight Association territory, due to different conditions and different circumstances, some of the carriers have felt that it was necessary to make allowances because they find that the service can be performed more economically by the industry than by the road haul carrier and they think it is economical to take advantage of the situation. I suppose that same situation or condition exists in trunk line territory. But maybe they would have no similar situations. I could not say as to trunk line territory (8621).

By Dir. BARTEL:

Q. Mr. Morris, when the road that you refer to—and I assume you are referring to the Elgin, Joliet & Eastern—when that road insisted upon making a cost study—or, I mean, making its allowance based upon current costs instead of 1915–1916 costs, the 1915–1916 basis, was that matter referred to the Eastern Executive Committee that had jurisdiction over both Trunk Line and C. F. A. (8622)?

A. It never reached the Eastern Traffic Executive Association. Our committee discussed it but, of course, the carrier of its own volition made the allowance and we were powerless to change it (8622).

Q. Well, when the matter came up before you, and they wanted to use different costs than 1915–1916, did that not have to be passed upon by the executive traffic committee (8622)?

A. Oh, if the proposition was put up there; but they put in tariffs without referring it to our committee (8622).

Q. Without referring it to your committee at all?

A. Yes, sir (8622).

In these circumstances, in central territory to which I refer, you are to understand my explanation that they relate to conditions where the carriers have found it more economical to pay the allowance to the industry than to perform the services themselves. Those
701 are the circumstances under which the carriers justified allowances. There have been several other plants of the character, not iron and steel, that get the allowances, but they are not numerous and they are not restricted to some particular kind of industry (8623).

Under the set-up in Central Freight Association, every carrier can take independent action either before or subsequent to the time an application may be referred to us. Every carrier has the right to take independent action if it so elects at any time. That is inherent in the whole constitution of our organization. It is true in making rates and anything else. Any line is not bound by our action but is free to act independently (8623). The purpose of our committee

is to get uniformity through the best possible extent. We persuade them as to what is right and what is wrong and they see the light and undertake to go along.

Q. Was the Standard Oil case referred to your committee?

A. Yes, sir; the present allowance to the Standard Oil Company was discussed by our committee.

By Mr. BURCHMORE:

Q. When?

A. Well, on several occasions; the present allowance, the prior one, and the ones prior to that.

By Dir. BARTEL:

Q. Did your committee ever turn down an allowance to the Standard Oil Company?

A. Not to my knowledge; no, sir.

Q. What prompted the action of the Standard Oil Company in making a complaint to the Commission?

Mr. BURCHMORE. Well, now, I object to that. I take it Mr. Morris is not competent to testify to what prompted the Standard Oil Company (8624).

A. I could not say why it was, but I know of that case. But I could not say as to why—what prompted the Standard Oil Company to go to the Commission.

Q. Was that passed upon by the committee before the Standard Oil Company went to the Commission?

702 A. Our records do not show that it was (8624).

As to the conditions referred to in the memorandum attached to the letter, Exhibit No. 363, I do not recall that these features were considered at any meeting or at any proceeding that I am aware of (8631).

I have no knowledge of such conditions existing and never recall that that was ever brought to our attention that such conditions existed in Central Freight Association Territory (8632).

Q. My question now is do you know whether these conditions ever existed in Central Territory, or exist now in Central Territory (8632)?

A. I have no knowledge of any such conditions; it was never brought to our attention, to my knowledge (8632).

Q. Mr. Morris, can you tell us whether any consideration was given by your committee to the framing of specific tariff provisions, rules, or regulations looking toward uniformity in the treatment of allowances paid to industries (8633)?

703 What we do is issue an information circular announcing what the allowance shall be and to some extent there has been attention given by the committee to the circumstances under which the allowance shall be made by the necessary tariff provisions, but generally the individual carriers issue their tariffs promulgating the allowance as shown in our information circular, but as

to having uniform tariff provisions for all carriers, we never promulgate anything of the kind. It was always left to the individual carriers to issue the tariff and all we undertook to do was to publish the allowance as a matter of information, and in some cases we undertook to state under what conditions the allowance should be made.

We have given consideration to the question of overhead allowances. That is, allowances to the industries that are not reached by the railroad that makes the allowance. They undertook to adopt a rule with reference to that, but they were never able to bring about uniformity, and it is left to the individual action of each carrier. With reference to the rule mentioned, some carriers felt that the allowance should be paid to plant facilities only for the carrier reaching the plant on whose behalf the plant facilities perform the service, but for competitive reasons they were never able to limit it to those carriers nor to get uniformity (p. 8634). In Central Freight Association territory we have discussed the proposition for our own selves and the trunk lines have been asked about the proposition too. It has been jointly considered but we could not come to any agreement. I think the trunk lines, like ourselves, follow the same practices that we follow. I think that in some cases they do not. It depends upon the circumstances and conditions (p. 8636).

704 I have a list here covering the allowances in effect up to the year 1929. It shows the basis for them. Some of them were put in in 1915 and 1916. They are my original records. I think as far as I know what we have here is the only one where we show the basis. It shows here the basis, 1916 costs, and here, based on decisions of the Commission, and what the current costs are. We undertook to find out in 1929 upon what basis these allowances were made, and this is what we have compiled but it has not been brought up to date. There is uniformity as to the basis of computing the cost because we have an established formula for that purpose, but whether the costs are on the 1915–1916 basis or current costs, there is no uniformity. Some of these costs might be on the 1920 costs or might be on the 1916 costs (pp. 8636–8637).

The explanation for these allowances being on a different basis has always been that when it comes to iron and steel industries, the larger number of them are on the 1915–1916 basis, and if they undertook to provide for allowances on a different basis for other iron and steel industries, of course it might create the discrimination. Railroads are not undertaking to pay or to compensate the iron and steel industry upon the basis of cost to the industry. They are arbitrarily allowing them a certain amount based upon 1915–1916 costs. That is the rule we have been observing. Of course, there was another point involved too, that if the carriers would have revised those allowances to current costs it might bring an increase so they would be apt to obtain an enormous amount of revenue (p. 8639).

We keep no compilation of the applications which we deny. I am trying to recall a case where there was a denial. I do not just recall one. We have had postponements, but I do not recall
705 a case where we had a denial. There are a few but not many for applications for allowances now under consideration. The action on some of them has been postponed for a time. We thought as a matter of policy it would be advisable to defer passing upon those propositions until such time as this hearing had progressed or was completed. We thought there might be some principles laid down or something like that would guide us or by which we could be governed in what would be done (pp. 8640–8641).

A few minutes ago I passed to you "rules for determining allowances to plant facilities." Though it indicates that it is revised to March 3, 1931, those are the rules under which the allowances are at present being determined.

Question by Director BARTEL:

Q. Well, the reason I bring that up, Mr. Morris, is, that there has already been introduced into this record as Exhibit 106, which purports to be "Procedure for consideration of applications for allowances, and rules for determining all allowances to industries for plant facility operation, adopted by the Central Freight Association, Trunk Line Association, and New England Freight Association"; and at the time these rules were introduced into the record, I understand that they were the rules that were then being used in the determination of allowances. Now, the rules which you have just handed to me, which purport to have been revised to March 3, 1931, are to some extent different than those already in the record."

A. Of course, I do not know what you have in the record, but a few years ago we undertook to revise those rules.

Q. Now, one of the particular rules to which I will call your attention, Mr. Morris, in the rules under consideration
706 Rule 9, Exhibit 106, what shall be considered as plant interruptions or interference; and under paragraph B of that rule—no, under paragraph D it says, "weighing for account of plant." Now, when we come to Rules 18, 19—or rather sections 18, 19, and 20, it would seem to indicate that the time between the interchange tracks and the scale is charged to the railroad, and the time at the scale and the time from the scale to the point of loading or unloading, as the case may be, shall be chargeable to plant, whereas in the rules which you have passed over to me, that particular phase of it at least—under what appears to be Rule 22, it reads as follows: "When cars are switched from or to interchange tracks, and by order of plant authority are weighed enroute, time of weighing only shall be charged to plant; provided the scale location is in line of progressive movement, and balance of time charged to the railroad."

A. Yes, sir.

Q. "When necessary to divert the movement in order to reach the scale, the scale shall be considered the interruption or interfer-

ence point and the time thereafter shall be charged to plant." Now, did you hear the testimony of Mr. Vivian, as to the way they interpret the rules in Western Trunk Line territory?

A. Why, to some extent I did; yes, sir.

Q. Well, what you have here seems to be a little different than the way they apply it in Western Trunk Line territory, does it not?

A. Well, from reading that, I would say, yes, but this is the formula that is in use. This formula—in 1928 and 1929 we had under consideration the adoption of a new formula, with the
707 idea of changing that formula; but it was never finally approved, and that formula still prevails, modified as Mr. Wagner says.

Dir. BARTEL. I think we ought to have this in the record, then.

A. That is the formula used, because Mr. Wagner is Chairman of the Accounting Committee on Terminal Allowances, and is the man who really is in touch with the formula that the carriers are using. That is the current formula for the eastern carriers.

Dir. BARTEL. This will be received in evidence as Exhibit C–65.

The document was received in evidence and marked "Exhibit Number C–65, Witness Morris."

710 I can identify the document you exhibit as one which was sent out by me to the Central Traffic Executive Committee on September 19, 1924. The subject of it was "Supplement tariffs to provide that the current road haul rates will cover services equivalent to team track or reciprocal switch services only, except where tariffs may othewise specifically provide." My recollection is that the
711 Central Traffic Executive Committee considered it and deemed that it was impracticable to carry out this proposition. There were some recommendations embodied in that memorandum of my committee. Those recommendations are identified in paragraphs 1 and 2 on the last sheet of the exhibit. The document was received in evidence and marked Exhibit C–66, Witness Morris (8648).

712 Exhibit C–66, dated September 19, 1924, refers in the concluding paragraphs to the Jackson Iron & Steel Company plant at Jackson, Ohio, and indicates that it was the purpose of the committee to carry out the finding of the Commission in the decision relating to that plant (8647).

The recommendation dealing with the general practice of carriers amending their tariffs or acting otherwise so they will perform terminal services at industries only to the extent required by the ruling in that case, presented a proposition which was discussed by the Central Traffic Executive Committee, but it was deemed impractical to attempt to give effect to it (8647).

A. That was the last time—my recollection is, that was the last time we considered a proposition of that character (8647).

Q. And you have had no further deliberations with the Eastern lines in reference to them, in recent years, since 1927 and 1928? (8648).

A. No, I do not recall that we have had anything of this character before us (8648).

713 JULIEN EYSMANS was called as a witness, having been first duly sworn, testified as follows (Vol. 10, p. 9963):

DIRECT EXAMINATION

I am Vice-President, Pennsylvania Railroad Company, in charge of traffic. I have been connected with the Traffic Department of the Pennsylvania Railroad for 40 years. The traffic policies for the whole system of this railroad come under my jurisdiction. I have been acquainted through business activities for the past number of years with the so-called terminal switching question of the carriers.

From the very beginning of my traffic experience until the present day, freight rates have been made with the definite idea that spotting service is included in the rate. Upon the principle, therefore, that freight rates have been so made, it is, in my judgment, entirely proper for the carrier to employ the industry as its agent to perform spotting where it possesses its own power, so long as the allowance for such spotting service is less than the cost to the carrier, and where the carrier could, itself, perform such service. The railroads should cooperate with their industries to facilitate the handling of inbound materials and expedite the forwarding of finished products. The railroads should do everything reasonable and proper in their power to be helpful in making the operations of the industries efficient to the maximum degree. We should do all we can within the spirit of the law to make the industries connected with the

714 rails of the carriers thoroughly comfortable in their transportation problems. We should do our utmost in carrying out the thought that we want the business men of the county to fully realize and appreciate that the railroads serving them are actually a component part of the industries themselves. One of the important functions surrounding the efficient handling of plant operations undoubtedly lies in the spotting service. The originating and delivery of traffic is an important and integral part of the entire service rendered by a carrier.

In these times the railroads cannot afford to give up any advantage that they still possess over the competition of highway transport. The outstanding advantage left to the railroads amid the new methods of transportation that have come into vogue in recent years is the value of sidings and terminal tracks used in and about industrial operations, which, generally speaking, are not available to competitors of railroads. It is important, therefore, that the railroads shall hold on firmly to every advantage that now accrues to them in the performance of spotting, associated with private sidings and industrial tracks, and make them so useful to industries that there will be a minimum of diversion to highways and competing waterways. It

would be foolhardy for the railroads to relinquish in the slightest degree any remaining advantage that they now possess in holding or controlling traffic. As the carriers under line-haul rates have assumed the spotting, both on inbound and outbound cars,
715 where it is more convenient and efficient for the same power—that is, plant facility power—to do the spotting service for internal movement dissociated from the line haul, it is a good business proposition for the carriers to engage industry power to also do the work which they have assumed to do—spotting—and that is right in line with the policy that has been in effect for the past several years. Any other step would, in my judgment, establish reasons for additional diversion of traffic.

After I had prepared myself to come to Pittsburgh I was looking over some of the old history in connection with this situation, and I stumbled across a statement made by our good old friend Mr. Brandeis in the old Five Percent Case, in which he said, in effect, that the handling of cars to and from private sidings was discrimination in favor of the owners of these sidings as against the small shipper who had to use the public freight station, and that the service of store door delivery was valuable. He called the collection and delivery to and from private sidings "store door", and it struck me as rather coincident that I did not stumble over that statement. To me the strongest part of that statement is that the collection and delivery to and from private sidings is valuable. I know it is valuable, and we want to make it just as valuable to the shipper as we possibly can, to not only do the things which I stated previously but to really hold on firmly to our business and prevent further diversion of traffic.

716 I agree with what the Interstate Commerce Commission said in the Car Spotting case, 34 I. C. C. 609, 616:

"As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary" (9963–9966).

CROSS-EXAMINATION

The following statement taken from an extract of the Traffic Executive Committee in Eastern Territory on September 10, 1920, is the preamble of the sketch of the tariff:

"The transportation road haul rates applying on carload freight to and from freight stations and team tracks shall also be applicable to and from private or industrial sidings, including the service of spotting loaded and empty cars for in and outbound movements under the following conditions:" I should say that this had to do with the application of rates including the transportation from team track at point of origin, from private siding at point of origin, to

team track at destination, to private siding at destination; having reference only to the rates for transportation for the services that the carriers, as such, are required to perform. In regard to the reference made to interference by the industry, I have laid it down very simply: Sidings where carriers may enter—that is what you have been calling the simple sidings; as a matter of fact, perhaps it
717 ought to be a simple service on a siding, a service on a siding without interference. I will elaborate: Sidings where carriers may enter at will and safely, and perform spotting service without delay or other interference occasioned by industry interference, similar to the service which carriers perform in connection with their own team tracks. It must be borne in mind, however, that in the operation of the team tracks there is at times some interference on the part of shippers or receivers who, when the engine arrives to do switching of the tracks, may just be finishing the loading or unloading of a car, and whose trucks may be partly loaded or unloaded, and to arbitrarily switch the track to place the loads or empties would occasion great inconvenience to the shipper; therefore, there may be tolerance shown to fairly meet the circumstances. In other words, if a man is unloading a car on a team track, using Pittsburgh Produce Yards, if you please, as a fair example of it, it may be he is almost through his job of unloading a car, and if we go in there and switch that car, he may not get it back for two hours to finish just a part of the load. Now, in that case, the engine comes up, the situation is looked over, and tolerance shown, and I should say that we missed the guess a great deal in our early consideration of this thing when we compared a siding to a team track, that we did not take into consideration those elements, and I am convinced in my mind that the handling of cars to and from team tracks
718 perhaps shows as much or more interference than you get at industrial plants where we have systems of tracks (9971–9973).

Then, another thing: It should not be overlooked that team tracks in many instances are located on very valuable properties owned by the carriers, and cranes and platforms are provided at carrier's expense. At carrier's expense, the tracks and appurtenances are maintained, as well as costly driveways; whereas, all expenses for upkeep of private sidings and their appurtenances are maintained by the individual. Then, when you talk about private sidings, go out in the coal fields and see what you consider those kind of tracks to be, and surely the rates on coal apply from the mine's sidings to the destinations and some of those tracks are very, very long. Now, it is true you may never be compensated because when you engaged yourself to build a track to a mine, or a branch to a mine, you have very good knowledge as to the volume of traffic. In other words, you might go to a mine siding and place 30 empties and take out 30 loads, so that you are doing a rather wholesale job on a long siding. On the other hand, when business gets dull you may go there and only get three cars, and when business is dull the mines don't have billing for the cars that they have loaded, because it is a continuous performance, and the result

is that you have what you call "No-Bill" cars standing around and you hay have a considerable amount of switching to do.

I would like to say that when we considered this tariff, which this special committee was appointed to draw up, we were, of course, a monopoly of rail transportation and we had been jibed a good
719 deal—the traffic officers—for not having gone to the limit as to what had been suggested by the Commission—Mr. Brandeis and these writers on railroad economics—we were performing all these services and should be compensated more than the line-haul rates. Some of the people that were meeting about these things and talking about them didn't really know what the conditions were, and the Commission very properly stated this in the Car Spotting case:

"While we have from time to time called the attention of the carriers to the possibility of increased revenue from certain sources and have suggested that it might be that the carriers ought to make a charge in addition to the line-haul rate for some services in connection with the movement of cars within industrial plants, for which no such additional charge is now made, we have never intended to suggest that an additional charge would be proper for services which by long continued general custom and usage have been treated as covered by the line-haul rate."

Following this decision here, what we did to clear up the so-called interference in the larger plants where systems of tracks were maintained was to put in a charge for all intraplant movements that would dissociate it from line hauls. Back in the olden days, there had been a custom in many places, where the railroad went in to perform the service in the nitrate plant layouts, that we frequently moved a car from one mill to another that had been partly loaded, to be completed in loading some other material; as, for instance, wire and nails or things of that sort that were made in different parts of the plant. We stopped all that. That was the interference we met in the intraplant movements. Now, the Commission said, "That is what we want you to charge for", and that is what we
720 are charging for. Outside of that—if you deduct that—our complicated or intraplant layout of the larger industries—you are in the same boat as you are with the team track over the mine siding. I don't see the difference.

Just to show how the gentlemen were thinking at the time: When this Committee was organized, we were told what to do. Now, there was just as much difference of opinion about this thing as there is about almost any subject under discussion. Just think—this was one of the fundamentals that were laid down: "Freight rates as published will apply between stations of carriers." There wasn't even any idea of performing the service between team tracks at that time. We were going to charge for the whole shooting match—team tracks, private siding, and the whole thing. Now, we switched the current of thought and said, "If you are going to do this thing, get down to rock bottom and do something that is sensible."

I am speaking of 1920. Our railroad had practically every situation that would be encountered in working out this problem, and for that reason, I suppose, and because I may be a little braver than some of the rest, I was appointed chairman, and it was a very difficult job and it was very miserable, because the shippers took it for granted this was a Pennsylvania Railroad job, and it was not a railroad job,

721 and I am sort of inclined to believe at the time it was a Pennsylvania RR job because some of our people thought at least it ought to be put out to the public and the Commission decide whether we could change the whole principle of rate making and assess a charge for spotting of cars on team tracks and on private sidings. It would have been an upheaval. Nobody could have withstood it, and in my opinion is this: That I could have worked out that tariff and eventually our committee could have segregated all the different kinds of industries and put them in "A", "B", "C", and "D's", according to that tariff by stipulating each and every one in the tariff; and then if a man was in "B"—if his siding or plant was located in paragraph "B", he could go to the Commission and say, "I am a more simple fellow than the 'B', and I should be put in 'A'." So it could have been done as a practical thing, but it was not a business proposition, and I will say to you now that this whole car spotting business in 1920 and this proposed tariff was a rainbow, nothing but a rainbow, and you could never get to where the gold was in it (9973–9976).

By Mr. HAGGERTY:

Q. And you haven't gotten that far yet?

A. No, sir; it is academic.

Q. * * * I am going to ask you now as to the kind of interference, the different types of interference. * * * I have in mind the kind of interference that was thought of in the old General Electric Case; that is, where the plant does not want the power of the railroad in the plant for industrial reasons. Did you have in mind here that kind of interference?

722 A. I am not familiar with all the ramifications of the General Electric Company, but I would like to say this: That the position of the railroads has been that when the question of paying an allowance is concerned, to do the work that the railroad is obligated to do, that fellow becomes our agent—nothing else. He does it at our price and under our requirements or he does not become our agent. Each and every case, I think, has got to be considered on its merits so long as you do not discriminate. In Florence Pipe case—that is a good illustration. A pipe plant at Florence, N. J., complained because we would not pay them an allowance, the same as was done at Burlington, N. J., just about 12 miles away. Two pipe plants competed with each other within 12 miles. We declined to do that because the engine that we had in that district was one of these big brutes that could not negotiate one of the tracks in the plant. We said to them, "If you can qualify

as our agent to perform this service, we will consider this thing." To this the Commission said: "You either pay this fellow—you have got engines that can negotiate this thing—you either pay him or stop it at Burlington." We are not going to stop it at Burlington. We are going to pay both of them. I think it is proper. If there had been a competitor at Florence, right away somebody would have had an engine there that could have negotiated that plant, because it was originally built to accommodate railroad power, and once the competitor established an allowance the Pennsylvania Railroad couldn't stand on a high horse any longer. We would have to do the same thing.

723 So if you will leave it in this way, taking the principles that were laid down by the Interstate Commerce Commission in the Cambria Steel Company case at Johnstown, back in 1920 or thereabouts where they asked for increased allowance. We denied it, and the outcome of that case was that we had taken the position that the Cambria Steel Company was acting as our agent in performing spotting service which we were willing to do under the line-haul rates but they would have to do it at our price or drop it and we would go in and perform the service, and the Commission so upheld—that they were our agents. Now, there comes a situation every once in a while where you have a district in which there are a number of small plants and one larger plant. The aggregate amount of switching in that district justifies the railroad in maintaining a switch engine such as to give constant and expeditious service. If the big plant says, "Now we want to do this work ourselves and we want you to pay us", then we would say, "See what you do to the district; we no longer then can maintain an engine there to serve these smaller fellows as expeditiously as we have in the past, and the result is you take out 50 per cent of the business and we can't maintain the engine there. We have to use a road-haul engine to perform that service and everybody suffers." I cannot relinquish the idea that the railroad is obligated to do that job under the circumstances I have cited, but that whenever we hire anybody to do it he is our agent.

724 We do not make an allowance where the plant won't let us in, that is, where we are interfered with right at the gate of the plant. In regard to the engine negotiating the tracks, of their inability to do so, there are cases where a plant facility allowance was made 20 years ago, and at that time there was an engine in that vicinity that could negotiate all the tracks. If today the railroad company said, "We are going to stop you as our agent doing this work; we are going to undertake this work again ourselves; so clear the deck so we can go in"; then we can't negotiate the track. Do you think that would be fair? I don't, and you will find that in many cases over a period of years the track curvature has remained the same and the power has grown very materially, and you can't negotiate tracks today that you could 20 years ago. So all those things have to be taken into consideration. We ought

to be governed and ought to be allowed to be governed by the circumstances in each case, and so long as we don't discriminate and so long as the industries do not ask us for unreasonable things, and which they don't as a rule do, I think we can get along as we are doing; but, the thing that, of course, has probably changed us more than ever—I have given here a pretty broad view of things and today you couldn't do this. About 83 percent of the tonnage of the Pennsylvania Railroad is handled to and from private sidings, if you exclude perishable freight, which is always on team tracks. Now, think what it would mean to our company to throw open all that traffic, or a large part of it, to the highway.

725 That is one of the last big things we have got left with industry in this country, and the reason so many industries still stick, and say this country could not exist without the railroads, is because of the great efficiency that comes from these private sidings in the operations of plants, and for that reason we have got to cooperate with them and we have got to block out this highway thing, these unregulated carriers. It seems to me no matter what we may have thought in Mr. Brandeis' day, the times have changed. Mr. Brandeis estimated at that time that there were 75,000,000 movements made of that kind and they were figuring $12.00 a car, so we would have in the neighborhood a nice sum of $150,000,000 and the Pennsylvania Railroad would have had a good part of it. That was something to grasp for. If you were a monopoly, if the government was advising the railroads to do it, and it looked like they were going to protect you, you could go out and get this $150,000,000, but I say to you it would have been a dastardly thing even at that time, because industries were located and built upon a definite understanding that spotting service would be accorded in the line-haul rates. I have myself assisted in locating many industries, and I consider it one of the most important things of the traffic officials of the Pennsylvania Railroad to locate industries on our railroad. You locate a nice industry about five miles from the town; you say to them, "You don't have to come in town. Buy your property cheaper. Don't use the team tracks. Build your own siding.

726 We will give you the service." Now, you say to them, after it is all settled and the wheels are turning and the product is moving, "We wish you prosperity. Grow and grow bigger all the time." Then the minute it gets big you step in and say, "Now you have got too big. We are going to charge you $2 a car." There is nothing fair about that (9976–9980).

The more modern way of doing things in reference to this particular class of service is actual usage, custom, and practice, and as you are coming abreast of the situation now you must meet it as it exists in the present-day way of doing things, and the demand of the public in reference thereto.

In the concluding paragraph of the committee's report you will find a reference there. We were just bold enough to call to the

attention of the executives at that time that there was a depression in the land and maybe they would want to postpone it. That is as far as we could go.

In cases where the curvatures have remained the same and the power has increased, we could not expect, at least, I would not want to call upon the clients to constantly broaden out their trackage to accommodate any larger engines that we may have in the field although not operating over them at all. Of course, you could have an understanding, and I don't think you would think it was the right thing to do, every time you entered into one of these arrangements for a plant facility allowance, to say,
727 "Now, gentlemen, we can negotiate your plant today, and see to it that whatever engines we bring in here you can still accommodate those engines, although we never expect to use you." If you had that sort of understanding, I suppose the shippers would have gone along with it, but in many of those cases it is impossible to broaden out curvatures, widen out the degrees of curvatures, because the corner of the new building has stuck in and prevents that without going to a lot of expense, in tearing down buildings to widen out a track. So I don't see very much in the point of calling upon them to spend the money if, when the arrangement was entered into, where we engaged the plant to perform the service, there was no understanding to constantly keep their curvatures abreast with the size of the engine. I cannot see any economy in requiring any such change as that. The physical condition of the track was one of the kinds of interference that we had in mind in framing this proposed tariff. If we encountered plant operations that interferred with our entering the plant, they might be shifting part of their tracks, and if they held us up, that might be an interference, and we would have the right to drop the car where we met the interference. We have always taken that position but that is a very insignificant item in practice. In these larger plants where the railroad engine comes in, and they do a part of the work and we do a part of the work, you will find there is a great deal of dovetailing and cooperation so that there is no delay on the
728 part of any one. The formula on which the plant facility allowance was made deducted all interferences. My recollection is the amount recommended by the accounting officers was. after a study of 12 days' operation, based on railroad operation versus the new agency. The allowance was based on everything that entered into the cost of delivering the car at the store door, the spotting, the actual spotting point that the railroad felt obligated in the rate to perform. If there were interferences in there they were taken into consideration, or delay to the road haul engine. They made appropriate deductions; and I may say this, that these plant facility allowances were worked out by an accounting committee so that there would be no influences of the traffic fellows or anything else in it; that a square opinion and just proposition would be made that would bear the scrutiny of the Commission or anybody

else when the amount was decided upon. It was supposed to be fair. Over a period of years there may be some changes in these figures, but I think it is interesting that we made our study in connection with this proposed rainbow tariff that the studies our railroad, and I took typical industrial divisions, the Philadelphia division, the Schuylkill division, the middle division, Pittsburgh division, Conemaugh division, the Cleveland and Pittsburgh end, and the Eastern Division of the Fort Wayne Railroad, and we figured out that the lowest cost for performing simple switching on an accurate formula worked out by our controller was in the neighborhood of 65 or 70 cents; and the highest was $1.40. The average, I think, was around about $1.03 or $1.07.

729 In speaking of designated interchange tracks we had thin in mind: That they would constitute the point of spotting, but in no instance would we allow the shipper to designate an interchange track or yard that would give him actual spotting. In other words, we were through with spotting of that kind of a thing. Where there was a plant system of tracks we would not spot. Delivery would be at these designated interchange tracks (9980–9984).

They would have to locate us a track, and if they had three railroads, they would have to locate some interchange point for each railroad, but the idea was they could not name us an interchange yard that would be where the spotting was.

Q. There would have to be a distribution of the cars from the interchange track to the various spots for loading and unloading?

A. That is where I stand by what the Commission said and not by that tariff. I agree that we could work out something, but I never agreed with the principle of this thing. "While we have from time to time called the attention of the carriers to the possibility of increased revenues from certain sources and have suggested that it might be that the carriers ought to make a charge in addition to the line haul rate for some services in connection with the movement of cars within industrial plants, for which no such additional charge

730 is now made, we have never intended to suggest that an additional charge would be proper for services which by long continued general custom and usage have been treated as covered by the line haul rate." That was revolutionary. The recommendations of this committee went through discussion but no practical effect was given to these proposals.

A series of copies of letters and resolutions that were adopted by the Traffic Executive Committee of Eastern Territory, which relate to questions of allowances to industries, the four separate pieces being identified by numbers in the upper right hand corner as follows: 1–1070–1071 and 1071–A, 3–1061, 4–1062 to 1067–A, inclusive, were received in evidence and marked Exhibit C–139 (9988).

The present plan I think is the most practical and fair plan. It is substantially the same plan as existed at the time the committee met. It has grown somewhat larger and it has become clarified, and we have eradicated anything within plants that the carrier is not

obliged to do. I think one of the things that was giving us more concern at that time was the Donner Steel case. We refused to pay an allowance to the Donner Steel Company. We were paying an allowance to the Buffalo Union Furnace and the Wickwire Steel Company. There wasn't any rhyme or reason why we should have declined to make an allowance to the Donner Steel Company, so the Commission said, "Either stop it for these other two fellows or do it for Donner." When we settled the Donner case up at Buffalo practically nothing further was done with the plan of the committee.

Mr. Chandler and Mr. Beek knew we were having troubles,
731 and these cases were going to the Commission constantly, but I think over a period of years the Commission has laid down so many principles surrounding the spotting situation that we have a plan now. The present plan is about the only practical thing you can do, but I will assume for the sake of argument that everything in there was true, and that the shipper ought to have come to us and said, "Why, it is foolish for you to write a letter like that. We ought to have come to you and voluntarily offered you the $2.00." Suppose they had given that there—paid $2.00 for everybody's spotting, whether it is a private siding or team track or industrial layout; today we would have to change that because they would have said to us, "We were too liberal when we gave you $2 a day. The trucking situation has entered the field, and we will have to back track on this $2.00." So I don't care which way you look at it, the present plan today fits in with everything that is modern in transportation, if the railroads are going to hold on to their share of the business.

Simple switching was the subject of controversy, and I really don't believe anybody fully realized what was going on on team tracks, and I never heard anybody define the difference between a private siding and a team track on the ground of how really much more the railroad was providing on a team track than at an industrial track. We have declined to employ certain industries other than iron and steel industries to become our agents for performing terminal
732 services. We probably have tried to discourage the opening up of allowances in certain cases when we have taken into consideration that to do so would open up in a great many instances where it was not necessary and once you do it for one group or one character of industry you can't resist it very long for any other in the same line of business. So that if you think that in one individual case it perhaps might pay you to let them do it, yet it wouldn't pay you in the whole situation. We occasionally are confronted with such situations in present day practice (9984–9992).

In the year 1920 the Pennsylvania Railroad handled 206,987 cars in the plant facility job where allowances were made; the gross payments were $255,876.19. That was a weighted average of $1.23 per car. As a matter of fact, the average weight per facility is $1.18. I should say as a business proposition, that the present ar-

rangement of paying allowances is more economical. There has been a complaint in connection with the basis of calculation being on 1916. Some here and there complain about it once in a while. It is less than the present day cost; that is true, but after all it is a give and take situation. The industry gets a lot of benefit, I think, themselves out of their own operation, doing the whole job, their intraplant work and the spotting work, and I think they would themselves prefer to hold on to what they have than to take a choice between 1916 and nothing at all. I think it is a give and take proposition, and I think the railroads and shippers in all
733 these cases have met on a fair basis of understanding, and there has been a business spirit about it all, and I think some cases where we pay a little less, because it may be that our accounting people didn't take into consideration everything—little instances of interference—so altogether it is a fair proposition as it is worked out at the present time. Even though some railroad departed from the 1916 basis, it was proved out it was less than the railroad company could perform the service for. From some of the matter that is embodied in this series of letters and resolutions (Exhibit C–139) that there was an intention and purpose at one time to restrict the payment of allowances to iron and steel industries from which there have been departures. In some instances some of the roads have slopped over and are paying on the basis of 1929 costs, because at that time the cost of the operation to the industry was greater than it was in 1916, or, perhaps, than it is at present, because they have reduced their wages and expenses materially.

Originally, the basis of allowance to the iron and steel industries was that their men were so adept in the operations at their own plants that they could perform the service much more expeditiously and more efficiently than a railroad coming in there and going around the plant, and on account of the exacting method of spotting, they would do it with greater speed than we could. That does not always prevail at other kinds of plants, and unless there was some real good showing as to why it should be done we would
734 rather continue on unless there is some good cause to do it ourselves, or unless the service is materially cheaper by the shipper, materially cheaper, because, as I said, it does withdraw from certain districts engines which serve big plants as well as little plants, and if you withdraw your service from the larger plants, your smaller plants suffer because you then go back to doing the work with road haul engines. The traffic department never decided a case until it had conferred with its operating department, first of all, to see what the conditions were, what they preferred should be done under the circumstances. In practically every case there has been joint consideration of the industry by the traffic department and operating department before we sent the accounting department in to make calculations. The traffic department would never say off the bat, "Yes, we will do that", or "We won't do that", until we confer with the operating department.

The operating officer is brought into the consideration of a new spotting job, and he knows this as a first principle: That the way the tariffs read and the way their history has been all the way through is that the railroad is required to spot the cars. He is no longer concerned with whether that thing is simple or not. I can give you what in my estimation is simple switching, and that if the team track is to be used as the example, or as the yardstick for simple switching, that by and large industrial switching is a simpler proposition than team track.

735 I think I gave in the very beginning of my testimony what I consider interference. Interference is where two powers go in, one the railroad and the other the industry, and they conflict with each other. But nowadays the operating men prevent such interference.

My idea on the simple siding or switching thing is laid down by the Commission in I. & S. 435 in just this way: "Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at larger industries is less per car than at smaller industries." In other words, you may have at one large plant what might really constitute several industries. You have the furnace, the by-product plant, rolling mills, and one thing and another, which are really several industries in one plant. If those were scattered along your main line it would cost you more to serve them than by going into one general terminal of a plant facility and doing this spotting.

In this plan that the Executive Committee of the Traffic Association was trying to work out, simple switching would consist of placing the cars at some point short of the spotting—actual door delivery. For instance, if you had a truckman here, and you asked him, "What do you consider a simple placement of a truck load of goods?" he would say, "At the door of the shipper where he customarily receives that freight." So far as the railroads are

736 concerned, the work that they are performing with their own power in serving private industries and team tracks we think is not more than reasonable, and every service that we are performing in that respect is, we believe, fully justified and is what is contemplated in the line-haul rate. I do not think you will find any appreciable waste of power over and above what the traffic ought to have in the way of service. The railroads today are doing their utmost to be just as efficient as they possibly can, and the only way we can prove to the shippers that they are an integral part of the plants is by giving them expeditious service. I do not think there is any extravagance in it. I think, as a rule, the complaints we get are that we are not giving it to them in good enough shape, rather than the radical economies the railroads have put into effect on account of the depression. There has been more tendency to complain about shortcomings rather than a surplus of service. I know of a case where we have three railroads entering a large plant, and

in order to prevent interference, one against the other, we take turn about. One railroad does it one month or two months, and the second road does the same. I think as time goes on the railroads will do more of that and not less, so that if there is any interference it is because two railroads are sometimes trying to shift a plant at one time, and that is very unfortunate and very disagreeable to the industry (9992–10000).

737 In each and every case the carriers' obligation ends at the store door, or what is equivalent to the store door, where the shippers or the receiver wants the car placed for outbound loading, or where the consignee wants it placed for inbound loading—one spotting. If we swapped interferences with the plants, I think we would have more demerits than merits, because going in to shift a plant often times we have to upset some of their work. After practice and experience is reduced to the lowest possible minimum. If a shipper sets up an interference against us—when he calls for us to come in to shift his plant, he has got in position to allow us to shift it without interference, and if we meet obstacles the yardmaster is right after him. It may be that some other road is in there, or maybe the shipper inadvertently did something that interfered with the actual operation. There are many times when the cars are put just that way and left right there. If a yardmaster can't shift a plant in a practical way, he may have to drop a car that is not accessible to the door where the loading and unloading is usually set up. But those cases are very few and far between, because of plant discipline. The amount of interference, the proportion of interference such as has been described, is so insignificant, and each and every case is so balanced by what we might call failures on the part of the railroad to accomplish certain things, that the give and take—we get the advantage rather than the industry, but if you try to lay down an omnibus tariff, and had a whole lot of enginemen—you understand cars are not placed by an accounting officer or by our general superintendent,

738 but they are put in there by a shifting crew, and a shifting crew is a very important arm of the railroad service. They try to be efficient to the industry. They want to hold their jobs and do what is the right thing. You have a tariff that says the minute you find an interference here you drop that car. How are you going to tell? He has got to use his judgment. Is the interference a minute? Is it five minutes? What is it? * * * Are you going to say, "Every time you meet an interference where we pay an allowance you pay us back 2 cents or 3 cents a minute?" You can't do it. This is done by practical people, and the efficiency itself in all these plants, both by the necessity of the railroad doing its work in the least possible time and the supervision over all those enginemen, and the supervision over the operators in the plant by their superintendents and supervisors, I say, brings down your interference to such a minimum degree that you couldn't describe

it in the tariff without getting everybody implicated every day in some violation of a technical reading of the tariff.

If a plant's track would become unsafe, or something of that kind, we serve notice on them that either they will put that in repair at their own expense or we will not operate the plant. It is always adjusted, however. The shipper is under agreement that if anything happens in the way of an accident he has got to pay for it (10000-10006).

739 As nearly as I can recollect, so far as the recommendations of the Special Committee are concerned, they have never been brought to life since the day they were discussed and abandoned. No reference has ever been made to this thing in my long recollection since 1920. Nobody considered it at all seriously. Matters concerning spotting have been considered off and on continuously throughout that period. There is some division of opinion among the railroad men as to whether allowances should be based on 1916 costs or current costs. The majority, I should say, felt it was a serious thing when anyone broke away from the uniform practice of allowing 1916 costs. There is not so much argument nowadays as to whether or not allowances should be restricted to iron and steel industries. It has not been definitely settled, but each case is decided on its merits. Some of the roads felt that the Pennsylvania Railroad was perhaps a little selfish in trying to confine it to iron an steel, whereas other industries meant proportionately the same to them in the value of the business. There is no particular uniformity in this respect today. We try to adhere to the 1916 basis. If anybody wants to break away from it they can do it. In every case where the railroads have departed from the 1916 basis they have taken the position that the allowance which they contemplate paying is less than the cost would be to themselves. I mean the records are very clear. In every case they show the item prepared by their accounting officers and traffic officers, so if they want to do it there is nothing to prevent it, but we would

740 rather see the 1916 basis maintained. In some cases the switching carrier assumes the obligation of delivery out of the rate they have made. In other cases the line-haul carriers have to pay the allowance. The switching carrier, in making a rate for switching, has made that rate to include spotting. He is in no different position from the line-haul carrier, and some of us have felt that the switching carrier, so long as he pays the cost himself when he is performing the service to a non-plant facility allowance plant ought to do the same thing at a plant facility allowance plant because they are performing the service in lieu of what he would agree to do if they didn't have the arrangement in effect. If I were trying to be a Solomon in this thing, I would make the switching carrier absorb it. But we just can't always get away with it.

Maybe some road is a little more eager to be nice and pleasant and get on the good side of the switching carrier or something of that

kind. It is just one of those business propositions that creep in. I think the switching carrier ought to perform it. You can't always do that because the amount of money they get is rather small. So you weigh all the circumstances and in most cases the switching carrier assumes all the costs of spotting. These are not things that come to the associations. They are matters that are settled on the ground by the lines locally. And if some road thinks that the switching road has not been properly compensated and that the line-haul road ought to bear the cost of the plant facility allowance, it may be settled that way. It is done both ways. There

741 is a division of opinion, not by the associations so much, but by the railroads in the associations, as to what policy should be followed in making these overhead allowances. The C. F. A. lines are controlled by different conditions than we have in the East. They have the western roads coming into the frontiers and the southern roads coming into the Ohio River; so that they are sometimes governed by different conditions than we have in the East. But there is a difference of opinion on the question as to whether we ought not to stick to 1916 and have a uniform basis. I would rather see it done that way. The large majority of the cases are on the 1916 basis but there are some exceptions based on the present day cost.

I am not here as a spokesman for others, but I can assure you in my contact with them they are in accord with the principles I have enunciated here, excepting perhaps as to the question of what basis we use—1916 or the present day.

My letter of September 17, 1920, as Chairman of the Association (Ex. C–139) was addressed to Mr. Chandler and Mr. Beek as officers of the National Industrial Traffic League and not to Mr. Chandler as the Boston Chamber of Commerce or as individuals. That was really an address, because we had no questions up with Mr. Chandler in connection with the spotting as an individual situation at Boston, because our rails don't run there. Attached to the above letter referred to was a tariff to be applicable in Official Classification Territory on spotting.

742 In Exhibit C–139, at page 1–1069, the following omissions were made: "It is contemplated that simultaneously with the publication of this proposed tariff all tariffs covering industrial allowances shall be cancelled. The charges in paragraphs (c) and (d) will have been determined in time for the meeting with the League."

The plan of the tariff we proposed did not contain the last paragraph of 1–1069, Exhibit C–139. In 1920 we had not really arrived at any particular charge, but when I figured our own siding operations cost was about $1.03, I thought we might work it out at about a dollar. But that never got the approval of anyone (10006–10013).

743 W. C. GLYNN, Assistant to General Traffic Manager of the Pennsylvania Railroad Company, having been previously

sworn, was recalled as a witness and testified as follows (Volume 10, p. 10114):

Q. Mr. Glynn, are you acquainted with the circumstances under which the allowance is granted at the Canton, Ohio, Plant of the United Engineering and Foundry Company?

A. In a general way; yes, sir (10114).

Q. What did you find out to be the amount it cost the Pennsylvania Railroad, or was costing the Pennsylvania Railroad, to perform the service (10115)?

A. I have no figures as to that.

Q. Do you know whether there was any undertaking to determine that in an amount per car?

A. Undoubtedly, there was; as the cost study made at that time would develope that, or would show that.

Q. Was that done by the so-called Accounting Committee of the allowance?

A. Yes, sir.

Q. Did your own operating officers have anything to do with the determination of what it was costing you at that particular plant in performing the services?

A. Of course, in all those studies, Mr. Hagerty, we had the local operating officers participate in the studies with the plant employes (10115).

By Mr. COLLIN:

Q. Mr. Glynn, during Federal administration, the railroad administration took the absolute and unbroken position that it would institute no new plant facility allowances, didn't it (10118)?

A. The railroad administration took the position that no increases would be made in the then existing allowances, and that no new allowances would be made to plant facility operations, preferring, as I understand it, to have all those matters passed upon by the Interstate Commerce Commission (10118).

744 Q. After the resumption of corporate control?

A. Yes, sir.

Q. And after a while your railroad, perhaps among others, adopted the fixed policy of refusing to institute any new allowance or to increase any existing allowance after the roads went back to private ownership (10119)?

A. That is correct; and that position was taken by substantially all railroads up until the time that the so-called rainbow tariff committee's proposition was indefinitely shelved (10119).

Q. And that was in about what year?

A. That was in 1923—the latter part of 1922.

Q. So that at any time from 1917 until 1923 any applicant for a new allowance had a law suit on his hands, and nothing else, if he expected to get it, didn't he?

A. That is correct (10119).

745 I stated in response to a question that after this idea of the rainbow tariff had been abandoned different consideration was

given to these applications for an allowance (10121). I think it was about in August 1922 the traffic executives shelved indefinitely the so-called rainbow plan. They then ruled first that no increases would be made in the present plant facility allowances to iron and steel plants and that any new allowances should be confined to the 1916 basis and to iron and steel plants for the purpose primarily of removing discrimination; there were no features of the proposed plan carried forward in any of the calculations following the abandonment of the plan. There was nothing in that tariff that would be helpful at all in arriving at anything to meet the competition that we would be required to meet in fixing other industries upon a parity with those receiving the 1916 cost basis. In fact we went right back to the original plan of our obligation under the line haul rate to make delivery at the unloading or loading point within the plant so that no features of the proposed plan were followed after it was side-tracked. It was never revised for consideration and reconsideration and I do not think it ever will be.

We were still guided by the rules that allowances if made in the future would be on the basis of 1916 costs and would be restricted to iron and steel industries. Of course, exceptions have been made.

Allowances have been granted to other than iron and steel
746 plants. When the railroads were taken over during Federal control, there were quite a number of allowances that had been developed by the committee functioning in New York during 1915 and 1916. Allowances had not been made to those iron and steel plants, for example, although their competitors had gotten in under the wire and the allowances were made to their competitors so that immediately after the shelving of this proposition all those questions came up. I would not say that in a very large measure these allowances were controlled by the commercial competitive influence as between the industries rather than more closely upon the operating circumstances and operating costs at each of the plants. The ruling principle is the fact that the cost of the carrier is so much less to employ the industry to perform the work that it is the duty of the carrier under the line haul rate that they are anxious to do it.

We later found that there had been a growing tendency to depart from the rule restricting the allowances to iron and steel industries and to keep those allowances upon the basis of 1915–1916 costs. The industry, of course, desires to get the payment for the work they perform for our account on as nearly the cost to them as possible but we have succeeded in getting the industry to perform that work on the 1916 cost basis and we think it is a good business proposition to hold to it as long as we can get them to do it for that.

As to whether some of the other railroads have some other information about these costs those things are continually coming up, but the railroad always takes the position that the allowances they make are so much less than cost to them that it is a very satisfactory proposition. Therefore, we can't very well complain.

747 Q. Well, is there any controversial question now pending as to that particular matter whether or not the allowances should be based upon 1915–1916 costs and whether they should be restricted to iron and steel industries, as between the Central Freight Association Lines and the Eastern Lines (10123)?

A. It is not an active matter now; no, sir.

Q. Do you recall whether the subject was devoted in recent years with your committee any consideration?

A. No, sir.

Q. As late as 1927 and 1928?

A. I believe there was some consideration given to that feature in 1927 or 1928, and the position taken by the traffic executives, following the shelving of the rainbow tariff, was reaffirmed (10123).

With respect to overhead allowances, there was no difference in the action taken by the Eastern Trunk Lines Terminal Executive Committee and the Central Freight Association Terminal Executive Committee. That question was never laid on our docket, to my knowledge. I am not a member of either committee (10124).

W. C. GLYNN, recalled as a witness, testified as follows (Volume 11, p. 11222):

DIRECT EXAMINATION

Generally speaking, although there are some exceptions, the rule under which the Pennsylvania System is operating today is shown in Exhibit No. 106 already in the record, which is a formula for computing allowances, and states that allowances are to be limited to iron and steel industries. That is not an inflexible rule and is not strictly applied in reference to all industries, and the local circumstances at each particular industry is the basis for the determination as to whether or not an allowance will be made to other than an iron and steel industry. As far as the iron and steel industry is concerned, they are all made without question on the 1916 basis. I will explain that answer. It is a procedure in all cases when an iron and steel industry raises a question that we
748 investigate it rather extensively before any action is taken. That is the procedure in all cases.

Q. Now, then, if the industry raises the question of either the performance of the service by the railroad power or the granting of an allowance, and the matter takes such form that finally resolves itself into the payment of an allowance, and that industry is not an iron and steel industry, is it not a fact that the only practical distinction in such cases is that your Traffic Executive Association acts on it before it is acted on by the Special Allowance Committee (11223)?

A. That is correct.

Q. That is really the only distinction?

A. That is really the only distinction.

Q. Now, the Pennsylvania Railroad itself has been the moving party—that is the moving railroad in the granting of an allowance

in two or three cases to industries at least not iron and steel. I refer to the Louisville Cement Company and the cement company I think at York, which was testified at the Pittsburgh hearing. The Pennsylvania Railroad acted favorably on such applications, did it not (11223)?

A. That is right (11224).

Q. And in doing so, felt you were accomplishing an economy?

A. In all of those instances where the allowances were made, it was developed to our satisfaction that the payments were less than the cost to the carrier.

Q. And it was an economy to you to have the industry act as your agent, rather than to send your own power there to perform the work yourself?

A. Yes.

Q. Was the Pennsylvania System the moving spirit in opposition to the granting of allowances, for the extension of allowances to other than the iorn and steel industry?

749 A. The Pennsylvania is represented on the Executive Committee which took that position.

Q. They were opopsed to such allowances?

A. Yes, sir.

Q. And that opposition still exists?

A. That opposition still exists, but there are exceptions, and there will be exceptions, undoubtedly (11224).

W. C. GLYNN, later again recalled as a witness (11242), testified further:

We have had some requests from iron and steel plants for an increase in the 1916 cost basis to the present day cost basis, which we decline. In instances where the plant has been enlarged and the operating conditions have changed, we have consented to a new study—performance study, rather, and that performance study has been allocated to the 1916 cost basis, but in all instances that I know, the allowance was on the 1916 cost basis (11242).

W. C. GLYNN, again recalled as a witness, testified further (11303):

Q. Mr. Glynn, may I ask you a question? Are you acquainted with the cost study that was made at the Phillisburg plant?

A. The Warren Pipe & Foundry Company is reached direct by the Lehigh Valley and Central Railroad of New Jersey. I do know that there was a cost study made in 1926 and the 1916 cost basis developed to be 76 cents. That was published by the Pennsylvania Railroad, effective June 26, 1926. Later on the plant requested us to make a new study, on account of the change in the operations—requested the trunk lines, and another study was made in 1929, and that performance study was allocated to the 1916 costs, and found to be 4 cents higher, 80 cents per car (11303).

Now, that allowance was made by the Pennsylvania Railroad, effective May 5, 1930, on the 1916 cost figures (11303).

750 V. W. DELANEY, Superintendent of Transportation and Construction, Youngstown Sheet and Tube Company, called as a witness being first duly sworn, testified as follows (Vol. 10, p. 10344).

DIRECT EXAMINATION

I am Superintendent of Transportation and Construction of the Youngstown Sheet & Tube Company.

I have a number of duties to perform among them being the handling of carload commodities for the plant; see that they are properly spotted and unloaded. I look after track construction and maintenance, and handle all the so-called loose labor in the plant. Transportation is just a small part of my duties.

The Youngstown Sheet and Tube Company has three plants in the Mahoning Valley, known as the Brier Hill Works, Campbell Works and Struthers Works. The Campbell Works is the largest, it being served by the Baltimore and Ohio, Pennsylvania, and Pittsburgh and Lake Erie railroads, with joint spotting service by the Pittsburgh and Lake Erie.

The Brier Hill plant is served by the Pennsylvania, Baltimore and Ohio, Pittsburgh and Lake Erie and Erie railroads, with the Erie Railroad performing the spotting.

The Struthers plant is served by the Pittsburgh and Lake Erie and the Pennsylvania railroads, with the Pennsylvania Railroad performing the spotting

We had a plant at Zanesville, dismantling of which was completed about March 1931.

At the Campbell plant under normal operating conditions, we would have seven engines working three 8-hour shifts, performing spotting work of twenty-one 8-hour shifts. We would also operate plant facility engines, two engines working 20 hours.

751 At the Struthers plant we would, under normal conditions, one engine working 16 hours and one working 8 hours performing spotting work.

At the Brier Hill Works, under normal conditions, we would have three engines working 24 hours and one engine working 8 hours performing spotting work.

At the time of this hearing the amount of railroad power required to spot those plants is very materially reduced. At the Campbell plant, at the time of this hearing, we have one engine which works 24 hours, and occasionally one additional engine which works 8 hours. At Brier Hill we have one engine working intermittently, and some times not at all. At the Struthers plant we do not have one engine working 8 hours, five days a week. At the Campbell and Brier Hill plants we have our own engines for performing intraplant work. At the Struthers plant the railroads perform all intraplant work, for which they are paid a regular published tariff charge.

During normal operations—in 1928–1929—the intraplant work at the Campbell plant required two engines working 20 hours a day, one engine working 10 hours, and one hot metal engine working 24 hours. At the Brier Hill plant we had two engines working 24 hours, one working 8 hours, and one hot metal engine working 24 hours (T. 10344–10347).

CROSS-EXAMINATION

In normal times, the intraplant service at the Struthers plant requires the use of one engine only five or six hours.

At the Campbell Works we have 45 miles of standard gauge track, consisting of 195 tracks; 76 of these tracks are general classification operating tracks; 119 are loading and unloading tracks, which
752 serve about 250 spotting points for loading and unloading. All of these tracks are on our property and are owned and maintained by us.

Normally, at the Campbell Works, seven engines working 24 hours handle on an average of 500 loads a day. We run fifteen or sixteen thousand loads a month. The inbound traffic is checked weighed what we call miscellaneous valuable material and for which we pay the published tariff charge. There is no raw material weighed. All outbound traffic is weighed for billing purposes. The Pittsburgh and Lake Erie performs the spotting at the Campbell plant practically working under the direction of our yardmaster, and it is from the plant yardmaster that they receive instructions as to what cars to bring in from interchange track and spot. All cars except coal and ore—our regular traffic can come in any time; they are accumulated and brought in regularly—daily. The P. & L. E. foreman has standing instructions to bring in the cars with his drag crews and place them where the joint power picks them up and places them. Special instructions are issued in respect to ore and coal, as those commodities arrive in too large quantities to come into the plant at one time. Our yardmaster informs the carrier how many cars of coal or ore to bring in, and also what grade of coal. If there is too much in bulk of one particular kind, we may hold part of that. Identification of the various grades is in the railroad yard by their own yardmaster. With respect to ungraded coal, we just tell the railroads how much to bring in and they order it in with their crews. We tell the railroads what grades we want delivered to our interchange tracks for spotting, and he orders it.

That is done in the railroad classification yard, arrival yard,
753 or train yard. In normal times, there is generally more coal in the terminal yards than we could take at any day in any one specified time. We would have to order it in two or three times a day as we consume it. The fact is, we consume 100 to 150 cars of coal per day, which makes it necessary to have several deliveries, we have to specify so many cars each time. The coal is under con-

structive placement in the terminal train yard. Ore is handled the same as coal, except that we do not make any calls for special types of ore; there is no grading of it; it is received in trainload lots (T. 10348–10351).

We have an open order in regular deliveries of all so-called miscellaneous freight, which includes everything, but ore and coal. The industry never performed interchange service with its own power at the Campbell Works. I have found no conflict between the industrial power engaged in performing intraplant service, and railroad power performing interchange service, even with our locomotives and those of the carriers working there at the same time. At our Campbell plant we have 15 miles of narrow gage track, used wholly in intraplant service, and we cross the standard gage track frequently—perhaps eight or ten crossings at various places in the plant. These crossings are in use by our intraplant engine, as much as by the standard gage tracks. The standard gage tracks crossed by the narrow gage are constantly in use in interchange service. However, there is an arbitrary rule, that no train, either narrow or standard gage, may occupy a crossing except for a direct movement over it, which keeps them clear of traffic at all times.

At the Brier Hill plant we have 40 miles of standard gage track, consisting of 157 separate tracks, approximately 40 of which
754 are break-up and classification tracks for transportation, and the balance are used for loading and unloading. With respect to the number of spotting locations within the Brier Hill plant—we have 75 to 100 specific commodities, so we naturally have that many spots at various times.

That is, we require those commodities to be spotted at a particular location. There are actually that many commodities, so we have that many spots, although there may be 500 cars spotted on these various tracks at a time, but there will be 75 commodities. We have some circumstances at the plant where traffic may be unloaded at any location along the track, like at a stock pile, which are not included within the number of spots I have mentioned—that is, we count any track like that as one spot. We have any number of tracks where we put 10 cars of scrap at one time, or 10 cars of coal, but when they are set there we move them ourselves without any further service from the railroad, and that is a spot to my mind (T. 10351–10354).

At the Brier Hill plant we have practically 50 spots on the various loading and unloading tracks, and the engine of the railroad that performs the service operates under the direction of our yardmaster in detail. Traffic for the Brier Hill plant is brought to nearby auxiliary yards, or, in general, on tracks provided by the company for the railroad. We turn them over to joint crews for spotting. Practically all traffic is first handled through the auxiliary yard, except ore, and that is generally hauled directly into the yard by a road train, and is not handled further by the railroad.

We follow substantially the same practice at the Brier Hill plant, in respect to ordering in coal, as we do at the Campbell plant—the coal being held in the train yard and not brought to our auxiliary yard until ordered.

755 At the Campbell Works we have extensive auxiliary yards for the use of the railroad. The railroad has some auxiliary yards outside of the gate and we furnish the balance. Generally the traffic is handled through our auxiliary yard to the plant.

Weighing in connection with inbound traffic to the Brier Hill plant is the same as at the Campbell plant; just those commodities which we need a check weight on, which is paid by tariff. The outbound traffic is weighed for billing purposes, except waste materials which go out without weights under another arrangement. I do not know whether we use weights on outbound traffic for industrial purposes. I do know all our mills have scales provided within our production department, where all material is weighed before being placed on board cars.

The Struthers plant, which is also spoken of as the Wire and Rod Plant, has 11 miles of track, consisting of 50 separate tracks, serving about ten spotting locations. We have an auxiliary yard at that plant on the industrial tracks that is made use of in the same manner that the like tracks are made use of at the other two plants, and it is from that auxiliary yard that the cars are finally spotted, by railroad power. Coal for this plant is handled in substantially the same manner as that for the Brier Hill and Campbell plants, except there is very little coal going into this plant, except for stock piles, and that is taken in in trainload lots. It so happens that only one grade of coal is used at this plant, and that is fuel coal, so there is no necessity for having special grades. At the Struthers plant, under normal conditions, we have about 50 to 60 inbound loads and between 25 and 30 outbound loads spotted daily by the pooled power.

756 At the Brier Hill plant we have about 10,000 loads per month, 70 per cent of which would be inbound and 30 per cent outbound. (T. 10351–10356).

There are no circumstances in connection with the operation of any one of the three plants as related to the spotting service which requires that the carrier pick out in the auxiliary yard certain cars loaded with certain commodities and line them up for spotting at particular locations and at particular times. Practically, there is a train of various commodities going into a district in a large plant and delivering them on their places and coming back and getting another train. In reference to this graded coal which I spoke of, it usually is spotted in batteries of 8 to 10 cars, and such coal usually goes into immediate use, except at the Coke Works, where it is crushed and goes into bins. We only call for a special grade of coal in cases where we are out of that particular grade at our stock pile.

When a railroad comes in with a drag of cars it only comes to the gate and leaves the drag in the auxiliary yard for further spotting. Engines assigned to spotting service usually take in as many cars as they can handle at one time for spotting at the various points. In nearly all cases an engine would spot 8 or 10 cars at one spot. We provide ourselves with arrangement for moving from then on.

Next in volume to coal and ore we receive stone and scrap. Spotting of scrap is usually placed in drags of 10 or 12 cars, in a stock house or one spot, and unloaded by an overhead crane. If scrap should go to the scrap yard, it is taken in drag lots and unloaded with a locomotive crane. As to whether the great majority
757 of inbound materials, the spotting that the rail crew does, would not be taking of one car and putting it at a certain door and another car at another door, but would be taking of several cars and placing them on a track accessible to the machinery of the plant for unloading—only in exceptional cases is that true. The spotting of empties for outbound loading is no different than that in connection with inbound traffic because usually our warehouse is handled with overhead crane and our platforms carry eight or ten cars. Our other warehouses have overhead cranes and five to twelve cars. Empties are brought into the plant in drags and placed as such (T. 10356-10359).

REDIRECT EXAMINATION

Under normal operations, we would have about 125 cars of coal coming into the Campbell plant, each day, and I assume that that same amount of coal would come into the railroad yard in one day. We often have more coal arriving into Youngstown than the normal daily requirements of the Sheet & Tube Company. The coal doesn't arrive from point of origin in exactly 125 cars per day, some days 100 cars may come in and some days 200 cars. If there are 250 cars arrive in one day and we only have track room for 125, we wouldn't take all 250 cars. At the Campbell Works, we use about four different grades of coal, 80 per cent is by-product coal which comes in in trainlots and has no classification. That practically comes from one point—Nemacolin in the Connellsville district. There are 75 to 100 cars in a train load. No classificataion of this coal is required. This coal is ordered from the train yard in drag lots, which lots frequently consist of 50 or 60 cars. That coal is moved from the auxiliary yard with a switch engine in lots of about 15 cars to our
758 mechanical dumper, and after that the railroad is through; any other movement is made by our own power. If we order cars in in grades we just say to the railroad people, bring in 10 cars of this kind of coal, 10 of that kind and so on until a train is made up and they know what we are talking about as the information is all in their bills. If we were to say to the Pittsburgh and Lake Erie that we want 10 carloads of coal for the coke ovens they would know

what we wanted. In ordering cars of coal in we do not order a car of this kind of coal and a car of that kind of coal and a third kind of coal and a fourth kind of coal and tell the carrier to classify the cars in their train yards in that way; there is no real classification in a sense done in the train yards of the railroads.

In connection with the narrow gage track and the standard gage track in our plants, neither track has the right of way.

The supervision that our trainmaster gives the railroad crews operating the joint power is practically the same that is given to the conductor of a switching crew going into a private siding for the purpose of spotting a car. I have worked on trunk line railroads and have worked in these crews as a conductor. When working as a conductor switching private sidings, I would look up a representative of each company and obtain instructions from him as to what to do and that is exactly what is done in the plants of the Republic Steel Corporation only in a bigger way (T. 10359–10364).

RECROSS-EXAMINATION

As to whether I said there were occasions when, because of the manner in which the railroads had brought the coal into their outer trainyards, that we would be short in our plant of a certain grade or grades of coal that we required for immediate use:

759 Only occasionally we would ask the railroad to bring down a particular grade of coal, maybe one car or maybe 10 or maybe 20—maybe as many as they had of that particular grade—and when the railroad brought that coal down they would run it in to the point where it was for immediate use in our manufacturing purposes, whether that was the coke ovens or some other place for consumption. It is due to some failure of shipments or some failure on the part of the railroad to make the shipments fast enough.

We never send out an order for "one car of gas coal" or "one car of coking coal." We bring coal in in trainload lots as a rule. Perhaps we have had one car of coal come in, however, it was a rush order.

760 Q. In view of the fact that you have had some actual experience yourself in switching operations and in switching cars to ordinary private sidings, and I suppose to team tracks, and you know something about the switching operations as they are conducted around the large plants in the Youngstown District such as the Campbell Plant and the Brier Hill Plant, have you any idea that you would care to express as between the cost of switching private sidings on a per car basis versus switching large plants like the Campbell Plant. Which would be the more economical for the railroad on a per car basis (10365)?

A. I am on record on two or three occasions in the past 15 years of making the statement it was very much cheaper to switch the large plant where there are a number of cars than to switch the small plant where there is a single track.

761 WILLIAM J. JONES, Superintendent, Transportation and Labor, Youngstown District of the Carnegie Steel Company, was called as a witness, being first duly sworn, testified as follows (Vol. 10, p. 10555):

DIRECT EXAMINATION

I am employed by the Carnegie Steel Company. My transportation experience has been 20 years as clerk, 7 years as Manager Transportation, and 7 years as Superintendent. I am familiar with the railroad operations at the Ohio plant of the Carnegie Steel Company, at Youngstown, Ohio, and more especially with the track lay-out and the terminal service incident to the inbound and outbound movement of cars, and the method of handing such services.

The Ohio plant began operations in February 1895, and it manufactures steel blooms, slabs, billet, sheet bar, pig iron, and commercial slag. Coal, coke, limestone, and ore are our chief inbound commodities, and steel blooms, slabs, billets, sheet bar, pig iron, and commercial slag are our chief outbound commodities.

The plant is served directly by the Youngstown and Northern, Erie, Pennsylvania, Baltimore & Ohio, and Lake Erie and Eastern, while the New York Central lines serve the plant through the Lake Erie & Eastern. Points of interchange with the Erie, Pennsylvania, Youngstown and Northern, and Baltimore & Ohio, are at the

762 north end of the plant, while those of the Lake Erie & Eastern are at the east side of the plant. The Erie also has a point of interchange connection at the south end of the plant. There are approximately 19 unloading and 12 loading points in the plant. The most distant unloading point from the point of interchange is 5,848 feet, the nearest, 1,225 feet, and the average distance from the interchange points to all unloading points is 2,700 feet. The most distant loading point from the point of interchange is 3,227 feet, the nearest, 1,349 feet, and the average is 2,114 feet. The right of way and tracks from the points of interchange to the points of loading and unloading are owned by the Carnegie Steel Company. During the five-year period from 1925 to 1929, inclusive, we handled inbound, 247 cars, and outbound, 933 cars per day. The number of inbound cars placed at one time depends upon what the locomotive can handle, which is approximately about 35 cars. From 5 to 15 outbound cars are moved at one time.

The applicable rate and tariff and the construction which has been placed upon them by both railroads and shippers for many years, requires the Youngstown & Northern, Erie, Pennsylvania, Baltimore & Ohio, and Lake Erie & Northern, as connecting common carriers, to perform the the service of placing cars at designated locations in this plant for loading and unloading (10557). The Youngstown & Northern places its cars for loading and unloading. The other connecting carriers perform such service through a pool or joint power arrangement.

Beginning in the year 1895, the various connecting carriers each placed their own inbound and outbound cars for loading and unloading. This resulted in a certain amount of interference by the connecting carriers with each other, and in the year 1899 they arranged with each other that one should render the placement
763 service in one portion of the plant, another should render such service in another portion of the plant, and so on, thus apportioning the service among themselves in such manner that their interference one with another would be eliminated. Later on, in the year 1918, the connecting line carriers determined that it would be more advantageous to have the placement service performed by pool or joint power, and accordingly, it was agreed between the Erie, Pennsylvania, Baltimore & Ohio, New York, Central, and Lake Erie & Eastern Lines that the Lake Erie & Eastern should perform the placement service for all these carriers, and that arrangement has remained in effect up to the present time. A careful record is kept of the cars, both inbound and outbound, moved by the Lake Erie & Eastern under this pool or joint power arrangement, from and to the interchange points, to and from the points of loading and unloading. The Lake Erie & Eastern pays the wages and expenses of performing the service, and at the end of each month bills the several railroads with their proportionate part of such cost, based upon the relation between the number of cars handled for each railroad and the number handled for all the carriers participating in the pool arrangement during such period. This pool power arrangement has worked most satisfactorily from the standpoint of all parties concerned. To begin with, the placement service is a comparatively simple one, and by concentrating the performance of it in the hands of one railroad, it can readily be accomplished without interference and with a maximum of
764 efficiency. In normal times, approximately three crews per 8-hour turn are engaged, pursuant to this pool power arrangement, in placing inbound cars, and during the ore season, two additional 8-hour crews are employed because of the large volume of ore—200 to 250 cars in a turn. If we worked double during that period it would be double that, and of course, it would mean double the number of crews. The loaded cars of inbound commodities are taken by the crews working under the pool or joint power arrangement from our receiving yard, which is the point of interchange to points of unloading. Outbound loads are switched by the same crews direct from the loading points to the outbound interchange tracks, of which there is a separate one for each connecting carrier (T. 10555–10559).

There has been no substantial change in nature of the terminal service required to be performed at our Ohio works since January 1, 1915. In interchange service 9 tracks are used for inbound commodities; 5 for inbound empty cars and 5 for outbound cars both loaded and empty. In addition there are two tracks assigned to the Youngstown & Northern Railroad for inbound and outbound

traffic moving between Ohio works and McDonald Bar Mills. We perform all our intraplant switching. Only with respect to coke, coal, ore, and limestone is there any classification of commodities before delivery of same to our yards. Coke, coal, ore, and limestone are very often classified after arriving in our yard and are placed on tracks assigned to each commodity. All other commodities are placed on one track indiscriminately. There is no classification of ore as to kind or grade.

765 I have made a study of the time consumed in performing terminal service to and from private sidings and team tracks in the Youngstown switching district.

A statement comparing the time consumed in performing this service on team tracks and private sidings with that performed at the Ohio works was received in evidence and marked "Shipper's Exhibit C–167, Witness Jones" (T. 10559–10560).

This exhibit shows that on the Wickliffe Branch of the Erie, to perform the spotting service at the various industries averages 38.4 minutes per car, or 1.56 cars per engine hour. On the Canfield Branch of the Pennsylvania, the average is 38.7 minutes per car, or 1.55 cars per engine hour. On the River Run of the Baltimore & Ohio, the average is 42.9 minutes per car, or 1.4 cars per engine hour, while at the Ohio Works the average minutes per car are 18.03 or 3.33 cars per engine hour. This means that in performing the service of placing cars for loading and unloading at our Ohio Works the railroads, on the average, are furnishing a service which costs less than half of that which they are rendering to shippers on team tracks and private sidings in the district. Our figures on the exhibit with reference to branch lines of the Erie, Pennsylvania, and Baltimore & Ohio cover the period from September and October, 1931, which were represented to me as typical of the service on team tracks and private sidings on those railroads in this district. The figures on such service are also in line with the studies offered in evidence in the Car Spotting Charges Case in 1915, I. & S.

766 Docket 435. The study of the time consumed in placing cars at the Ohio Works covers a ten-year period, 1921 to 1930, inclusive. I might add that the time consumed at the Ohio Works also includes time for weighing empty cars for loading outbound and the weighing of outbound loads, which does not obtain in the time study of the private sidings and team track delivery.

I have made a study of the length of time cars are detained in the Ohio Works and have prepared a statement showing the result thereof. A statement showing the result of this study was received in evidence and marked "Shipper's exhibit C–168, Witness Jones" (T. 10560–10561).

The exhibit shows that during the year 1930 the average day's detention of all loaded cars from the time they were received in our yard to the actual interchange of the car on outbound was 1.095.

At our McDonald Mill cars are placed by the Youngstown & Northern Railroad while at our Upper Union Mill at Youngstown

placement is by the Pennsylvania Railroad as Agent for the Erie and Baltimore & Ohio, under the joint power arrangement.

Our Ohio Works is one of our largest plants in the Youngstown District.

As to whether the use of the word "detention" in connection with Exhibit C–168 is used in a demurrage sense or in the sense of designating the elapsed time that the cars are at our plant is intended to show the quick turn-over of equipment, the word itself is used as referring to the time a car is in a plant. As a matter of
767 fact, there is no detention as we think of that term in ordinary language—there is no detention in the sense cars are detained on private sidings or other small delivery tracks. We have our own equipment consisting of 242 cars of all kinds which we use in intraplant service and which are sufficient for that service.

The figures on Exhibit C–168 indicate that there could not be much detention of cars by appropriation in intraplant service, because the time average here is so short as to exclude that idea, but we have an adequate supply of cars for such service (T. 10561–10563).

CROSS-EXAMINATION

The detention, shown in Exhibit C–168, is the actual time figured from the time the drag crew cuts away from the car after placing it in our yard to the time that the car is actually placed on the outbound track for the drag crew to take it out—there isn't very much detention by either the railroad or the industry.

Referring to Exhibit C–167 where we compare performance within 4,800 minutes by the Erie and Pennsylvania, and 5,280 minutes by the Baltimore & Ohio, against 20 million minutes by the Ohio Works, I will state that I had no particular object in view in that comparison; we just had a report compiled in connection with the Ohio Works, and the time study on the Pennsylvania and Baltimore & Ohio simply refers to the number of days we had made the study. If
768 I had used 20 million minutes in all cases, I do not think the result would have been any different. In fact, if I had not included some of the years in the Ohio Works, figures that I did include, I would still make a better showing. I am well informed with respect to the showing which would be made by the railroad. The figures as to the engine hours for spotting cars compares very favorably with studies made in the 1915 Car Spotting Case. If I had used, with respect to the Ohio Works, the same period of time as I used with respect to the railroad calculations, that is, September and October, 1931, I believe the relative showings would compare very favorably. I believe the showing would be in favor of the Ohio Works, due to the fact that we are not using as many crews now due to the depression as we generally used during this whole period. I do not have figures for the Ohio Plant for September and October, 1931, but while the average for the 10-year period shows 18.03 minutes per car, there are periods where the average was 15.43, 15.50, 17.52; 17.11, and 16.05, exclusive of intraplant service (T. 10563–10565).

My testimony is entirely with respect to shifting power, and I am comparing the railroads working for 18 minutes to perform a service at our plant and the railroads working 30 or 40 minutes elsewhere performing the identical service; neither one has anything to do with the intraplant work performed by our engines or anybody else's engines.

769 As to whether those first three team tracks or private sidings testified to as being typical placement services on those lines in the district, I would say they are the best organized operations in either case for the reason that there is less interference. There is practically no interference on any of these three studies made. In connection with the Ohio Works I did not feel it was necessary to take what might be called a typical period because, as I said before, we used the Ohio Works' figures already compiled. The figures represented by the 20 million minutes came from records kept by us. We keep for ourselves a record of the joint power used in switching and furnish the railroads a copy and it is from that record that I obtained the time of 20 million minutes. The record is kept for our own information and for the railroads so that they will know how to make charges one against the other or divide up the cost of the service. The record is kept not only as a matter of time but for the purpose of showing the time it takes to spot each car, and such a record is kept for all plants.

We have three locations where only one car can be placed, and all other points of unloading will run from three cars to whatever number the engine can handle. No record is kept of the number of trips the engine makes to the interchange—we keep the total hours the crew is on duty. We know the number of cars handled from the records our yard clerks give to our yard record office—the

770 number of cars received 7 and the number of cars turned outbound loaded. We make no record of the individual moves from our plant except that they are moved on some tariff basis.

During the 10-year period the switching service at the plant was performed by the Lake Erie and Eastern for all railroads and during that time we were operating our own power—since 1898. We have ten engines, but at the time of this hearing we were not operating all of them at one time—in regular operations, about six.

Wherever we have two or more engines working in a yard, there is always bound to be some interference, but we have arranged our work or apportioned those crews to certain districts in the yard so the interference, whatever there might be, is reduced to a minimum. I haven't any idea of what the minimum interference would amount to over the 10-year period referred to because we never pay any attention to it unless it affects the operation of the plant—stops production. That is all worked out by the yardmaster in charge of the several divisions of the yard, and there must of necessity be a certain coordination between all the power working in our yard. As to possible interference of our intraplant service against the power of the Lake Erie & Eastern—really the interference, what there might be,

wouldn't mean anything because the crews are in the plant for a certain allotted time and have so much work to do. I do not know what the interference would amount to in a given day as I have not given it any thought. As I have said before, the crews are in
771 the plant a certain allotted time and any work not done on one turn is done on the next, and in the end everything is taken care of and works out smoothly.

On joint power, under normal operating conditions, there are three 8-hour crews working each turn, and during the ore season there are two extra crews working eight hours; however, I don't know how much idle time those crews have, although there is some, not due to interference, but lack of work at the immediate time. There is no charge made by the railroad against the industry for such idle time (T. 10565–10570).

In our Ohio Works we have a trackage of 40.74 miles. All our ore is unloaded into stock piles, and other commodities are unloaded into bins. After the ore is placed in a stock pile there is no further intra-plant movement. The ore is picked out of the stockyard by an engine, put into a bin, and from that bin it is moved to the furnace by what we call a skip car. Limestone and coke are handled the same as ore, that is, down through the bin into a skip car.

Our coal is not graded before it is spotted, and that applies to all our commodities.

The conductor of the railroad crew switching from the interchange to spot locations receives the orders from our yardmaster to place so many cars of a certain commodity at a certain point. For instance, the yardmaster informs the conductor of the crew how many cars of brick or coal or other commodity to place. Our
772 shipments are so regulated that as a general rule we have our daily requirements come into the yard every day, and as a result the switching crews are told to make up a draft for a certain destination of a certain commodity, and the conductor of the crew goes ahead and does that. Any cars in excess of those wanted by us are left on a particular track until called for, and are under constructive placement from the time they arrive in the railroad break-up yard, through tender notices sent us by the railroad. Cars are not brought down from the railroad break-up yard only upon instructions from the industry; they will bring them down at their own convenience. The reason cars are on constructive placement in the railroad yard is because of the railroad system of tendering cars to us. We are notified that there are cars in the train yard, and the report so notifying us is received around 7 o'clock each morning and when received the railroad is told to bring the cars in, and this is a standing procedure due to the manner in which our shipments are received. Every day we repeat the order to the railroad "bring them in." It might be in the case of ore that there would be 200 or 300 cars, and in such case, we would have to tell the railroad how many to bring in at a time. In figuring demurrage we commence our time calculation from the moment a car is set out by a carrier in the train

yard, because the car would be on constructive placement in the yard, and the only way it could be released or moved would be upon instructions from the industry as to that particular car. We
773 do not identify cars by their numbers. We just tell the railroad to bring in so many cars. We don't care what the commodity is or how many cars there are of it.

We keep a record to determine whether demurrage under our average agreement is a debit or a credit and that is by car numbers. Such record is made from the tender notices sent us by the railroad. When a car arrives in our yard, it is checked by our service clerks. We are guided by the date of the notice. If a particular car is held in the railroad yard for some reason, we check up to find out for what reason, and then, of course, we would chase that particular car; other times they are handled by train loads. The only reason such a car might be held out would be on account of it being a bad order, and not because we ordered it to be held out. We always tell the railroads to bring in every car they have in the yard. In the case of a car held in a yard by reason of bad order, the railroad would notify us, and we would notify the demurrage agent. This is a constant day-to-day process.

While it is largely true that the carriers are not free to bring in any cars from the train yard until they are expressly notified by us each day, and then they don't get that notice by number but merely an omnibus statement "bring in all you have got", or "bring
774 in a certain number of cars of certain commodities", I might add to that, just to show how these cars do move from the time the cars are actually received in the break-up yard to the time they are actually delivered in our yard, the average is 12 hours and 49 minutes. I think that shows conclusively that the cars do not stay out in the railroad yards for a very long period (T. 10570–10574).

Some of the railroads have auxiliary yards where they might place some of our cars for their convenience, but as a general rule the cars move from the break-up yard directly into our yard. The Erie and Pennsylvania have what is known as the Erie-Pennsylvania joint yard, about midway between their break-up yard and our receiving yard. Our receiving yard located on our own property is really an auxiliary yard for all railroads, and it is there cars are set out when they are brought from the train yard. It is from our auxiliary yard that cars are redistributed to the spots. We give the railroad an order to take so many cars of a certain commodity and deliver it to a designated spot, and those orders are not given by car numbers, except in probably the cases of brick, castings, and lumber. In the case of coal, the order to the railroad would be to bring in so many cars of coal from their break-up yard into our yard, and after arrival in our yard our yardmaster would give the conductor an order to place so many cars in a certain place
775 for unloading. We have only three places to spot a single car of coal. All other places will run anywhere from three to

twenty-five. Our yard is merely a temporary set-off of the car in its moving to the point of unloading. Such set-off is convenient not only to ourselves but to the railroads. I know the railroads have indicated that they consider it a convenience to have that yard pretty close. We think that the arrangement whereby the railroads perform the interchange service, and we perform the intraplant service, is most efficient and economical insofar as it affects our industry. I don't think it would be more efficient or economical if the industry performed the entire service both intraplant and interchange, and the reason for that view is due to the fact that we pay practically the same scale of wages that the railroads do, and employ the same number of men per crew except in two cases and neither of those cases has anything to do with interchange work. One case is handling of molten iron from the blast furnaces to the mixers or pig machines; another is at our slag crushing plant.

It would not make any difference who owned the engines and operated them because both the engines engaged in intraplant service and those engaged in interchange service are working under direction of the yardmaster of the Carnegie Steel Company in making moves within the plant on the industrial track.

As to whether, for that reason, the matter of efficiency and economy does not enter particularly into this particular Ohio
776 plant, well, each division of that power has its own particular line of work to follow and our own crews work directly on intraplant work, takes up all their time, and the other crews, of course, on strictly interchange work (T. 10574–10578).

I have jurisdiction not only over the Ohio Works but over the McDonald and Upper Union Mills—all of which plants are in the Youngstown district. Upper Union Mills, located at Pittsburgh, identified as No. 38 on the notice assigning these cases for hearing, is dismantled. The Upper Union Mill at Youngstown is a different plant. The McDonald Bar Mills are at McDonald, Ohio (T. 10578).

At the Ohio Works ore is delivered in trains consisting of as many cars as an engine can handle. I don't like the word spot—we call it placement. However, it is really not placed at the point of unloading but is left in what is called our gravity ore yard from whence it is dropped down over a haulage system and placed at the point of unloading by this haulage system on the car dumper. The haulage system is owned by us.

Coal is placed on a trestle, where we can handle about 25 cars, and is unloaded off that trestle without any discrimination as to any particular point. Coke is placed in trains, under a normal operation, of about 24 cars; there are six actually placed on a bin, and the others all handled with a haulage system, that is, the engine bringing them into that track would only stop once, cut loose, and after
777 which the coke will be handled by the haulage system. Limestone is handled with coke.

About the only commodities we receive and of which the railroads probably have to make two deliveries in a day, two or more, are coke

and ore. We are in a position to receive all other commodities at the convenience of the railroads whenever they can deliver them to us.

I think the general practice of coal dealers in Youngstown is to ask the carriers if they have any coal for them, and if so to bring it in to their yards. Car numbers do not mean anything to us. It is only in our final record that we record cars by number, in accordance with the facts of performance. We show the date cars are received by their numbers.

As a general rule trunk-line carriers push cars into our receiving yard, and then disconnect the road locomotive, after which the Lake Erie & Eastern, operating in pool power service, picks up the cars and places them, the result being that our receiving yard operates as an interchange point as between the services of the trunk line carriers and the pool power services of the Lake Erie & Eastern. We don't have any operation where only one empty is spotted. Our shortest track for loading holds 5 cars while our longest will hold 15 or 20. The loading is done by overhead cranes, and there is no instance at the Ohio Works where a particular car is placed at a particular spot (T. 10578–10582).

778 There is no appreciable amount of interference between the industries' locomotives performing intraplant service and the locomotives of the Lake Erie & Eastern performing the pool power service. As a general rule, our own crews do not work in the same portion of the yard as those of the Lake Erie & Eastern. The little bit of interference there would be is not worth consideration. Whatever interference might take place, that is, the interference of the railroad power with the plant power and vice versa, would balance themselves. I have one instance in mind where in our blast furnace yard the Youngstown & Northern performs about one-half of the work and our plant engine the other half—occasionally crews of the railroad locomotive will have to go into the yard to place coal. It happens frequently that when the railroad power is in that yard placing coal they come in contact with the movement being made either by our own power or the Youngstown & Northern Railroad. The yardmaster immediately in charge of that section of the yard, rather than tie up their crews, says, "You place those cars in a certain track and we will place them after we get cleared away from here." The railroad engine then goes about its business, and after a short period we take the cars with our own power and place them at the boiler houses. That is about the only time there would be any substantial delay if everyone handles his own material throughout.

The ore spotting charge was cancelled in 1927 as far as our Ohio Works was concerned. We have a gravity yard. The railroads do not place those cars at point of interchange, therefore, that tariff does not apply (10583).

779 In our gravity yard the railroads place ore cars on industrial tracks up to the trestle, which is short of the point of delivery. Our ore yard will hold 88 cars. Our haulage system takes the

ore from the ore yard up over a car dumper and dumps same at the transfer cars, and by transfer cars the ore goes into the stock yard.

I might add that in I. & S. Docket 12420, which was before the Commission, the question of a charge for the services of the line-haul carriers in the matter of spotting cars of ore at our plant; the distance to the center of the ore yard from the property line of the Lake Erie & Eastern is 927 feet; from the Baltimore & Ohio from the center line of Ohio Junction yard to the center line of our ore yard, it is 7,535 feet; from the Erie Gerard yard, 22,305 feet; from the Erie and Pennsylvania joint yard, 7,585 feet.

We weigh all inbound items other than coal, coke, ore, and limestone on our industrial scales by our own power. All outbound traffic is weighed by railroad power, and to the best of my knowledge such weights are used only for billing purposes. I do not think that we pay the railroad any charge for the weighing of outbound shipments (T. 10582-10584).

The McDonald mill of the Carnegie Steel Company, at Youngstown, has a system of industrial tracks of 11.72 miles with six tracks for inbound commodities; three tracks for inbound empty cars, and five tracks for outbound cars, both loaded and empty.

There are 12 points for loading and 7 for unloading. For
780 unloading there are two places where it is a single car spot, and both of those are coal, and the others will each approximate about five cars. There is no particular spot for loading, however, from 5 to 10 cars can be loaded on each track. All cars are loaded by an overhead crane or mill tractors. These tracks are owned by us and located on industry property, which connect only with the Youngstown & Northern Railroad, about the ownership of which I know nothing.

Our plant is connected indirectly through the Youngstown & Northern with the Erie, Pennsylvania, Baltimore & Ohio, and the New York Central, which latter carrier includes the Lake Erie & Eastern. The spotting is performed by the Youngstown & Northern. The volume of traffic inbound is about 145 cars per day and 83 cars per day outbound. In addition to the outbound traffic the Youngstown & Northern handles our molten cinder from the Ohio Works to the rubbish dumps at McDonald, and that amounts to 180 cars per day. We have very little intraplant traffic at the McDonald Mill—performed by the Youngstown & Northern under a published tariff. We receive arrival notices from the Youngstown & Northern. Two tracks are assigned to the Youngstown & Northern in our Ohio works yard, and they receive and deliver cars on those tracks. The Ohio works yard is not a part of the McDonald Mill. The two plants are about 5 or 6 miles apart. There are two tracks

assigned in the Ohio yard for receipt and delivery of cars
781 the same as at the McDonald Mill. The terminal service of the Youngstown & Northern with the Carnegie Steel Company is identical with that of joint power. The same instructions

are given to the Youngstown & Northern as are given to joint power for their service. We do not order the Youngstown & Northern to bring in cars. They have the traffic moving between two mills, and it is assembled on the two tracks assigned for that purpose. The inbound traffic for the McDonald Mills comes largely from the Ohio Works and moves over the 5 miles of track between those two plants. About 70 percent of the products of the Ohio Works is transported to the McDonald Mills for finishing—it is simply an interplant movement, and as to that traffic, neither the Baltimore & Ohio, Pittsburgh & Lake Erie, Lake Erie & Eastern, New York Central or Erie participate. The other 30 percent goes largely to our Upper Union Mills in Youngstown; a small amount of tonnage might go to some of our Pittsburgh plants. I do not know what volume of traffic is interchanged by the road-haul carriers to the Youngstown & Northern for the McDonald Mills, however, it is very little. All I can say is that most of the inbound traffic for the McDonald Mill comes from the Ohio Works as semifinished steel, however, I do not know what proportion—such traffic is of the total traffic going into the McDonald Mill (T. 10584–10590).

Traffic coming in from connecting trunk lines, connecting with the Youngstown & Northern, is ordered in by that carrier. I
782 know nothing about that. It is not until the Youngstown & Northern gets the traffic to McDonald that the industry issues instructions for disposition. When the Youngstown & Northern brings traffic to the McDonald Mill, it is temporarily set off on our track awaiting orders to spot the cars as required by the industry. None of that inbound traffic is weighed. If it is weighed, it is weighed at the Ohio Works before it leaves that plant.

The total traffic moving inbound to the McDonald Mills, including from the Ohio Works, totals 145 cars per day, and outbound 83 cars per day, with 180 cars of molten cinder hauled from the Ohio Works to the rubbish dumps at McDonald.

Our Upper Union Works at Youngstown has a system of industrial tracks owned by us and located on our own property consisting of 2.8 miles of tracks, with 9 tracks for unloading and 3 for loading. At that plant there is no auxiliary yard, the initial delivering being made right to the point of loading or unloading. Industrial tracks are connected with the Erie, Pennsylvania, and Baltimore & Ohio Railroads. This plant manufactures bar mill products, consisting of steel hoop, skelp, bars, and miscellaneous shapes. The normal volume of traffic at said plant is 30 cars per day inbound and 40 outbound. The principal inbound commodities are steel blooms, slabs, and billets. Spotting is performed by the Pennsylvania under a pool power arrangement. Under normal conditions there is one switch crew constantly in the mill on each 8-hour turn.
783 Each of the railroads have sidings adjacent to this plan from and to which the Pennsylvania Railroad switching crew takes cars. We have a yardmaster who gives the railroad switching crew orders. The service at this plant is substantially the same as that

which I have described with respect to the other plants, in the particular that the crew operating within our yard brings in what cars we want when we want them to.

The only weighing at the Upper Union works is of outbound commodities for building purposes. We have very little intraplant service there, however, what there is is taken care of by the Pennsylvania under a published tariff charge (T. 10590–10595).

784 LOUIS C. BIHLER, of the Carnegie Steel Company, was called as a witness, being first duly sworn, testified as follows (Vol. 10, p. 10647):

DIRECT EXAMINATION

I entered into the transportation and traffic service in May 1883, with the New York, Lake Erie & Western Railroad, now known as the Erie Railroad, serving as stenographer, rate clerk, and contract agent until November 1, 1888, when I became connected with what is now the St. Louis-South Western Railroad, commonly known as the Cotton Belt Route, first as contract agent and later as General Eastern Agent, remaining there until March 31, 1895, when I went into the service of the Carnegie Steel Company, first as
785 Assistant to the General Freight Agent, then Assistant General Freight Agent, then Assistant Traffic Manager, becoming Traffic Manager on January 1, 1904; was made Assistant to the President and General Traffic Manager on May 1, 1928, continuing in the latter position until September 30, 1932, when through reorganizations the status of the Traffic Department was altered. This totaled more than 49 years, and I am still in the picture and the atmosphere of traffic and transportation as Assistant to the President.

As a result of my long experience I am familiar with the history of the performance by the railroad of the service of placing cars at convenient points for loading and unloading on the tracks of the industries. During the period I was in the service of the two railroads before mentioned, and helped to construct freight tariffs and solicited traffic, it was always the understanding that the freight rate covered placement of the outbound car at the usual point of loading of the industry, and the inbound car would be delivered at the usual point of unloading. This was also true later when I joined the industrial organization, the understanding always having been, as already stated, that the rate of freight covered the placement service in question.

I was a witness in the Car Spotting Charges Case, I. & S. Docket 435, reported as 34 I. C. C. 609, and furnished numerous exhibits in connection with considerable testimony. As I recall it, at the
786 conclusion of my testimony, Commissioner Harlan asked Attorney Hagerty whether he had any questions to ask, and he answered, "No", so I think I gave a very complete record in that case. As I recall it I also attended all the hearings at which rail-

road and industrial witnesses were heard, in the territory in which our plants are located, and the testimony there given was exactly in line with my practical experience from many years before, as to the rates including the placement of cars at points of loading and unloading.

By Mr. VAN BUSKIRK:

Q. The opinion of the Commission in that case states: "It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line haul rate, and in the Los Angeles Case, 18 I. C. C. 310, we held that where this service is merely a substitute for team track receipt and delivery of carload freight, the line haul rate covered the service for the reason that rates generally in this country have been constructed upon that basis." Is that statement of the Commission in accordance with your own views and in accordance with the great mass of testimony in that case?

A. I read the opinion of the Commission in I. & S. Docket
787 No. 435, and I think the statement which you have quoted is absolutely correct, and based upon fact and history, and that no other conclusion could have been justified based on the testimony in I. & S. 435. It is a well-known fact that in constructing any freight rate, certain sums are set up to cover the terminal services at both ends, which two items are different from the item of the line haul rate itself, all of which confirms that existing rates have been constructed to cover the customary placement of cars at usual points of loading or unloading.

Q. In the case referred to, the Commission also stated: "Existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industrial spur or private siding or upon the tracks of an industry plant and the outward movement of cars from such tracks without regard to the size or nature of the plant." And then the opinion of the Commission concluded that "To now add a charge to the line haul rate for that service would be revolutionary." Was this conclusion of the Commission in accordance with your own views and in accordance with the great mass of testimony in that case?

A. It certainly was (T. 10647–10649).

The Commission having found that the freight rates included the
788 service of placement for loading and unloading, the railroads continued their practice the same as they had been doing many years before, and in addition, where the industry provided an instrumentality of transportation and performed part of the terminal service or spotting for account of the carrier, the industry made arrangements with the carriers for compensation based on cost, figured by the railroads themselves, through a Committee of Accounting Officers, carefully analyzing the cost of the industry's engine service based upon the record of the year 1916. As I recall

it, this plant facility allowance authorized under section 15 of the Interstate Commerce Act became effective about the year 1917. Tariffs were published by the carriers and filed with the Commission covering these allowances. In most cases the tariff specified the allowance to be the actual cost, but not beyond a certain maximum. Since 1915 both the railroads and shippers treated the rates then published and those published thereafter as including the performance by the carrier of this service of placing cars for loading and unloading at convenient points in plant of the industry.

It has been customary for our traffic department to furnish freight rates to our Purchasing Officers and to our sales depaftment, and invariably, and in all cases, such rates have been quoted to our other officers without any strings tied thereto; in other words, these officers always understood clearly that the freight rates always included the service of placement for loading and unloading,

789 according to whether the material was outbound or inbound.

If freight rates were limited to line-haul service, and other charges were to be added, we certainly would have raised a question as to the reasonableness of such application. To our minds, and to the minds of all shippers, the question always was, "Is this rate a reasonable one, not only to cover the line-haul but to cover the terminal service of the carrier at points of loading and unloading as well?" It is, of course, understood that our rates are made on a group basis, and these group rates have always included spotting service.

This feature again came out in the Hoch-Smith investigation by the Commission in Docket 17,000, Part 6, which section covers specifically iron and steel articles, the hearings on which I attended, and the record there, of course, will speak for itself. The scale of rates therein ordered by the Interstate Commerce Commission was with the full knowledge on the part of the railroads, the shippers, and the Commission that they covered this so-called terminal or spotting service. Otherwise there would, without doubt, have been serious objection on the part of the iron and steel shippers to the scale of rates ordered in by the Commission in that case.

As far as Carnegie Steel Company is concerned allowances have, generally, remained the same during the past 15 years. There have been no increases in allowances in spite of the fact that the

790 level of freight rates today is substantially greater than in 1916, the year the calculations were made, on both inbound and outbound traffic, and also the substantial increase that we have had to grant our employees who manned our engines, as well as increased fuel and supply costs; in other words, our operating costs have gone up with the wage increases, etc., but the allowances from the carriers for doing part of their work for them has remained absolutely the same.

The abolition of the long continued custom of including free spotting service, on which the industry relied, and the substitution of

new and additional charges for such service would entail a severe hardship to the steel industry.

We are sympathetic with the carriers in their desire to secure more revenue, and always have been, but changing practices of a lifetime standing we think is the wrong place to start. A difference of several cents per ton in costs of performance, represented by new spotting charges, frequently represents the difference between black and red figures on our books, and such increases cannot be passed on to the customer. While we have gone through the "depression of all times", and full recovery is still some distance ahead, I believe the steel industry has suffered more drastically than any other.

The difference of several cents per ton, as previously mentioned, might represent the difference between red and black figures on our books, and in order to overcome this the steel industry would
791 doubtless have to consider very seriously the use of motor trucks which would take material from the loading point in the shipping plant to the unloading point in the receiving plant; and, in addition, where there are possibilities of water movement, this would have to be considered. In the Pittsburgh district we have a number of plants that are ideally situated for shipping material by river, and in the Greater Pittsburgh District there are a large number of plants situated on the three rivers, Monongahela, Ohio, and Allegheny, who could receive and ship by water; and, of course, the extent to which this truck or water movement would obtain would mean loss of business and revenue to the railroads (T. 10649–10652).

Our Homestead Steel Works extends from the eastern end of the Borough of Munhall to what is known as Brown's Bridge, along the Monongahela River, a distance of about two miles. In my opinion, from the standpoint of terminal services, the Homestead Works instead of being one enormous building as some people are inclined to think is really only a collection of units of individual mills. As a matter of fact, within the area of the Homestead plant proper there are really some 20 individual plants, each with its spur tracks running from the main or running tracks of the Union Railroad. The fact that these individual units are all concentrated within the area mentioned means an economic handling by the railroads of the placement service in connection with the large
792 tonnage handled in and out of the plants on a normal operation. To emphasize this point, there are within the Greater Pittsburgh District individual plants of various concerns, each separate and distinct, amounting to as many as 20 separate industries, who have spur tracks, which plants altogether as not any larger in output than the total units of the Homestead Steel Works but are scattered over a much greater area than the Homestead Steel Works covers; and the aggregate cost of the individual switching by the trunk lines at these separated plants certainly must be several times as great as the switching cost for a similar number of cars at the Homestead Steel Works. What I have said with respect to Home-

stead Steel Works is more or less true of the situations existing at other large plants of the Carnegie Steel Company, as well as of the subsidiaries of the United States Steel Corporation named in this hearing, with the location of which I am familiar.

The principal units making up the Homestead Steel Works are two or three large structural mills, 5 or 6 plate mills, open hearth plants Nos. 1, 2, 3, and 4, a roll plant, a brick shed, foundry or metal mixer, armor plate department, counting room, and pattern shop (T. 10652–10653).

CROSS-EXAMINATION

There have been some changes in the last decade or two—in the sense of requirement at the old furnace plant of having an engine standing by to feed it coke, limestone, ore in certain quantities.

793 We have always had stock piles, back to the time of my connection with the industry. It was customary for blast furnaces using lake ores to receive in the summer time their normal requirements, plus a certain quantity, but not the entire quantity, consumed during the winter. The difference between now and 1918 was the installation of car dumpers to handle ore more quickly and get the ore to stock piles in less time. Back about 1915 it was more or less the custom for the railroads to stock cars on trestles and do what they could on trestles, but the more modern operation is to install a car dumper. At the Ohio Works we have been able, during the ore season, to handle as many as 250 cars of ore in one day.

With respect to the rates on iron ore, where the railroad does the work of carrying the car beyond our property line to the point of unloading, the roads assess and collect at spotting charge. That is under the decision in the Ore Spotting Case of 1916. Prior to 1916 the line-haul rate included placement on the trestle. I think it is a most unfair decision and unjustified to pick iron ore out of all other commodities and say on iron ore the line-haul rate applies only up to the property line, and on everything else it includes spotting.

The Commission fixed the iron ore rates up to the gate of the plants, and in doing so disrupted the cost structure by splitting groups. They fixed charges for handling from the vessels to cars,

794 they fixed the charges for handling dock ore and direct ore, and they ordered a spotting charge put on. They did a whole lot in those days, but we have sort of swallowed it gradually and lived it down and gotten over our dislike. We are getting away from it even if it is a discrimination and the plants on the lakes don't have to pay that kind of charge when it is dumped right into their yard.

The rates include the service of putting the cars in position accessible for loading and unloading. As to whether we thought that was a railroad service which generally had been so by custom and practice for a long continued number of years without interruption, and we still think that to be the case, I would say yes. That service,

or that duty of the railroads, as we understand it, is not modified in any sense by the fact that sometimes we perform the service for the railroads and are paid for it.

We have very little interference at our plants. We are organized to avoid interference, to make it easy for the carriers where they do the work. I do not understand that we are not receiving allowances to cover the cost of the service, because the railroads make some deductions of the engine-hour time during which there are interruptions and interference. The allowances that are received by the Carnegie Steel Company, where that company performs service with its own power, is inadequate, insufficient to compensate the industry for the operating cost of performing the service. The railroads
795 refused to change from the 1916 basis. The railroads applied a certain formula in determining what these allowances are. They determined what the 1915–1916 costs were, and applied it to the time consumed by the locomotive in performing the service, divided between the intraplant service and the interchange service. I don't know that any interruptions specifically appear in any calculations we make. We calculate the number of intraplant loads, and the railroads are only charged on the interchange line haul business (T. 10653–10657).

I have not been perfectly familiar with details for some years, but in 1917, when the allowance was established, I was familiar. The formula probably was fair in 1916 and 1917, but, as I have stated, the costs have gone up with us and the railroads have not met the costs. It is a very good formula for the carriers but a poor one for the industries.

A proposal to sever terminal services from the line-haul and set up a split system of rates, analogous to the ore system, applied to traffic generally, would not be popular with shippers and traffic men. They tried to establish a switching charge in 1920, and I was down there on the firing line, and Mr. Eysmans referred to it last week as the pot of gold that was not at the end of the rainbow. There is no demand on any part of the shipping public for any such proposal that I ever heard of—the total rate is big enough now. As to whether there would be any objection by the
796 shipping public to the separation of the line-haul rate and terminal charge, as such, I think they would feel that the line-haul rate plus a separate terminal charge, added together, would add more to the existing through rates, which would be just one more way of increasing the total charges, and they don't like to see the practice of many years' standing, where one rate covered the total service—terminal service at both ends—changed. The country was built on that, commerce conducted, and industries built, relying on the good faith of the continuation of such a performance, and it would be uprooting commercial practice and manufacture and have everyone running topsy-turvy. Assuming our combination charge of the line-haul rate and terminal charge reasonable—different people have different interpretations of the word reasonable.

The checking of the line-haul rate and the spotting charge separately, even if the total were not greater than the present line-haul rate, would not be very popular (T. 10657–10660).

797 HARRY S. WALKER was called as a witness and, having been duly sworn, testified as follows (Vol. 11, p. 10867):

DIRECT EXAMINATION

I am assistant trainmaster, Norfolk & Western Railway. The plant of the Pulaski Iron Company, Pulaski, Va., has not been in operation since December 1930. When in operation the spotting of cars for loading and unloading has been performed by locomotives and crews of the industry, and the railway company does not make any allowance. Cars are delivered and received on designated interchange tracks.

CROSS-EXAMINATION

To my knowledge the Norfolk & Western has never performed the spotting service on any industrial track for this industry (10869). To my knowledge we have never been asked by the industry to place the cars on the industrial tracks, in a position accessible for loading and unloading.

The curvature in the plant tracks is too great to permit the Norfolk & Western locomotives to come in upon them (10870).

I know of no iron and steel industries or any other industries that have systems of industrial tracks on that part of the line that comes within my jurisdiction where we perform the spotting service. At most industries we make delivery at some designated interchange track at the plant entrance. There is no departure from that rule, that I know of, so far as our line is concerned (10871).

Statement by Mr. YOUNGER:

It is our position that our obligation in our tariffs is completed when the traffic is placed on those interchange tracks, and that the service in and upon the industrial track is purely plant service and not a part of our common-carrier service. I presume in some places we make deliveries and spot cars in positions accessible for loading and unloading on private tracks, and in instances where there
798 is no complicated track layout and no industry having its own power and so on, merely served by an ordinary side track or siding. The distinction in the two cases to my mind is, we do the equivalent when we put the cars at the Pulaski yard on the interchange tracks that have been designated for that service; that is, that is equivalent to spotting the cars on the sidings of those industries you have in mind (10873).

799 J. R. DOWNES, recalled as a witness, having been previously sworn, testified as follows (Vol. 11, p. 11212):

CROSS-EXAMINATION

I know generally what formula is used as a basis for figuring allowances paid by the Pennsylvania Railroad to industries for spotting cars on industrial tracks. (The following is a statement appearing on the face of that formula recorded in this proceeding as Exhibit No. 106 (Read by Mr. Hagerty):

"Action of Traffic Executive Association, Eastern Territory, at meeting held July 18, 1929:

"In view of the conditions under which arrangements for plant facility allowances have developed, it was the concensus:

"(a) That such allowance should be limited to iron and steel industries, and:

"(b) Should be on the 1915–16 cost basis.

"In the event that any departure from the foregoing is deemed advisable, the proposal with all of the facts should be presented to the Traffic Executive Committee having jurisdiction, for review, prior to any investigation of costs or approval or recommendation of the proposed arrangement."

There are some iron and steel industries on our system on which we perform the services with our own power. The expenses incurred are charged to our operating expense on basis of the current costs.

Rule 6 of the formula reads (Read by Mr. Hagerty):

"The allowance to a plant for terminal services shall be the same amount for each connecting railroad, and shall not exceed the amount it would cost the railroad to perform the same service with its own locomotives, at its convenience, without interruption or interference; the cost of the railroad operation to be in each case determined from available data by the Study Committee."

Rule 8 reads as follows:

"The services between points of interchange and point of loading or unloading, as the case may be, shall be charged to the railroad, provided it is a progressive movement to point of placement or delivery, performed without plant interruption or interference. If plant interruption or interference is encountered, the service after such interruption or interference shall be charged to the plant."

Then follows rule 9, that describes certain kinds of interfer-
800 ence, which I need not read in detail. Then Rule 10 outlines the manner in which the time shall be allocated as between the engines of the railroad and the plant—that is to say, how much of it shall be charged to the railroad time and how much shall be charged to the plant (11213–14).

I understand these factors of interruption and interference as described in the formula as a guide for fixing an allowance where the industry performs the service—also items taken into consideration where service is performed by our own power to the extent of charging any time against the plant are ignored in our operating

performance, if you want to put it that way. But where the railroad performs the switching as against where the railroad grants an allowance, is entirely to my mind a different proposition. The railroad has an obligation to place the car in position for loading or unloading. Where they perform that with their own crews, there may be interference; generally I think it is of rather a temporary nature, and when there is interference, it is generally adjusted between the operating officers of the railroad and the plant. For instance, the operating officer in charge of a district, outlines to the crews the work they can do or must do. He knows generally the time required to perform that service. When excessive time is put in, he investigates it. He rides with the crews maybe one or two days a week, and where there is interference causing delay to the switching operation, it is generally a matter that is straightened out in a cooperative manner with the plant managers. It is true that there is such interference, but as far as charging the cost to the industry, no, I don't know of any tariff under which you could charge that. That is a matter for consideration locally in connection with each individual industry, rather than a general question. And where circumstances arise in connection with an individual industry, it indicates that the railroad might in its operating
801 performance go somewhat beyond its common carrier duty and that becomes the subject of investigation by the operating department.

As to whether I ever understood this formula as undertaking to describe or define in any way the limits of the common carrier service in performing this spotting of cars on industrial tracks, I will give you my own opinion. I have nothing to do with the preparation of the formula, but I have always understood it to be a basis for arriving at the cost of the operation. That cost having been arrived at, the railroad in employing an agent to do some work for it, makes the best deal it can make. That cost may not be the price they pay, but it is simply a basis for arriving at the cost of the operation. I have never construed it as being a formula for the railroad obligation in switching a plant (11214–215).

With reference to the part of the interchange service described in the formula as chargeable to the railroad, and whether I regard that as a correct description, of the railroad's obligation, I would not want to say yes, or no, without knowing specifically what rule or paragraph you refer to.

As to rule 6, to which my attention is directed, and which was read a while ago—that designates the point of interruption or the point of interference—I would not say that that was a formula for the obligation of the railroad. From an operating standpoint, our understood obligation is to place a load in position for unloading, or place an empty in position for loading, and until we have done that we have not carried out our obligation. I do not think this formula or the description of the service therein is used by the operating department as a measure of its obligation under the rates,

because I doubt if many of the local operating officers are thoroughly familiar with that formula. It was prepared for an entirely different purpose so far as I know (11216).

802 As to whether the operating people, when an allowance was made to a plant considered the plant their agent in performing that service, my answer is yet—at a price worked out in a business way with the agent that you are employing to do the work. I don't make the allowance, but that is my understanding and attitude. It is a business proposition. You find out what the cost is, and then make the best deal you can, but never in excess of the cost as I understand it, on the 1916 basis (11218).

In a majority of cases on the railroad the power which we are using can negotiate the tracks, but there are still plants built years ago, that the curvature and everything was built on the basis of a very light switch engine, most of which have passed out of the picture, because none of them have been replaced as they passed out in the last 10 or 15 years. And that power has increased in size generally (11219).

As to its being a waste of money to make an industry which performed the spotting service, as agent for the carrier, spend a lot of money to revise or modernize its tracks, simply for a technical reason to place itself in a constructive position so that it could switch it with its own power; although the industry was to go on doing the switching—that that would be an unnecessary waste of funds—it would not only cost a lot of money, but in most cases I am familiar with it would be impossible, practically, to change the curvature. It would not be a benefit to us to have them change the tracks unless we could not get together on what we would pay them for doing our work, and if they wanted to exact an abnormally high price, then we might even have to do one thing or the other, find an engine that would negotiate the curves, or compel them to change their track structure. If a shipper was dissatisfied with the switching service we were giving, I would hear of it very promptly I imagine. Once in a while a switch engine is late, but so far as the general set-up for switching industrial plants, I know of no general complaint (11220).

803 In the matter of operating service by our own power, we make no distinction as between iron and steel industries and other industries, so far as I know, generally.

There are plants on the railroad where two or more railroads reach, that one railroad is employed by all of the railroads to do the switching now, but those are not instances where we employ the industry as an agent—it is where two or more railroads reach the same industry, and as a matter of economy and convenience one railroad is employed, perhaps turn about, to do the work for all.

I know of no restriction on the operating department to hire an agent to do the work for them, although I have not given thought to that particular question because all of the allowances have been worked out in conjunction with the traffic department and we have

never taken the industries on the railroad as a whole and made an investigation to determine whether in each particular case, we could hire the industry to do the work cheaper than ourselves. To some extent we regard it as an operating question—there may be other factors in it that our traffic department are particularly concerned in. In the end it means a tariff and the traffic department prepares the tariffs (11222).

804 D. F. STEVENS, Gen. Superintendent of Transportation, The Baltimore and Ohio Railroad, was called as a witness, and having been duly sworn, testified as follows (Vol. 11, p. 11393):

DIRECT EXAMINATION

My name is D. F. Stevens. I am general superintendent of transportation of the Baltimore and Ohio and have had an opportunity to observe the working out of the terminal arrangements and facilities throughout the Baltimore and Ohio system.

CROSS-EXAMINATION

Taking into consideration the interruption and interference described in the formula, we get very little of that, and wherever there is a case arises, it is usually a matter of investigation between our terminal officer and the similar officer of the plant, and corrective action is taken and it is fixed up. Of course, on the other hand, we give the plant some delay. We figure in a general way that one just about offsets the other. If there is any interference it is usually handled by the terminal officer of our company and the plant officer. By corrective measure I mean that it is in the nature of eliminating the interference. That is a general statement (p. 11394).

REDIRECT EXAMINATION

As a result of my investigation and experience I would say the use of the steel company's engines in doing the work in a plant for us is made I think with the basis that they can do the work more economically, and the character of work in that type of plant is such that there is a mixture of the intra-mill work and the inter-mill work. There is a question of immediate service at places, there is a question of movement around through the plant and the gen-
805 eral set-up of that industry is one that lends itself particularly to use them as an agent for our company's work, and it has been my observation that they will do our work at least as cheap, and I am inclined to think ordinarily cheaper than we could do it ourselves. There are certain plants where it is cheaper to do the work with our own power. It depends altogether on the layout of the plant and the character of the work we are required to do. The existing arrangement with regard to terminal services are generally satisfactory.

I have read Mr. Eysmans' testimony very carefully and am fully in accord with his testimony in relation to the operating part. The other part I do not know anything about. One point in his testimony that was most pertinent is the new factor that has been developed in the relation of transportation to industry as he spoke of in relation to the motor truck. I feel that is a most potent factor that must be taken into consideration in connection with the terminal services that we are investigating here (pp. 11395 and 11396).

RECROSS-EXAMINATION

As to whether I know any reason why there should be any difference in treatment with reference to an iron and steel industry and any other industry from a transportation standpoint or from the standpoint of this particular service, I will say this. My relations with it have been largely with iron and steel and that business lends itself particularly to that situation. There are other industries where the same situation prevails. I do not think it is a matter that you can generalize on, and I think you have got to take each case, if you are going as we have outside of the iron and steel industry, and deal with each case as it presents itself.

In cases where we find by our applied principle that it is more economical to engage an industry, such as an iron
806 and steel industry, as our agent to perform the spotting service the same principle would apply under a like finding with reference to any other industry. It just happens that the nature of the iron and steel industry has resulted in the engagement of those industries to a larger extent than others as the agent of a railroad in performing that class of service. That is the significant sense of my answer.

I do not think that the example you have given me in the formula under Rule 9, Item A (Rule 9, A is shown as Appendix, page 47 to original report in this proceeding, 209 I. C. C. 11) is an interruption. (p. 11397).

As I understand the thing under the line-haul rate we are required to take the car and place it at the proper place for unloading. We are required to set the empty at the proper place for loading out and that is our responsibility and duty.

With reference to designation B of the same Rule 9 relating to plant operations that interrupt or interfere with the movement of switch locomotives, if there was really very much of that I would have thought something of it but it really does not amount to anything. It is relatively small. I would not feel that it laid any undue burden upon our operating expenses; that has reference to our entire system.

With reference to the item "holding cars for advice from the plant as to disposition." That condition does not exist today. In normal periods there has been some of that. It was regarded as merely incidental and nothing of the nature that I would regard

as interruption or interference except in isolated cases. It is a part of the work.

Answering your inquiry as to whether in my examination and study of this general question I have reached any conclusion as to whether or not, under our present practice, having
807 in mind the allowances, as well as the operating service as a whole, the matter is handled in a manner that is mutually economical to the railroads, or whether in its aspects it lays any huge or undue burden upon our revenues or upon our operating expenses, it is my opinion that our practice in relation not only to iron and steel but to other industries where this allowance is made, that the work is being done in those instances at least as cheap as we could do it ourselves, and I am very sure in a number of instances very much cheaper than we could do it ourselves. In addition to that, it is my feeling that we must approach this thing with the idea of being helpful to the industries, and we must do so from a railroad standpoint at this time and anything that helps the industries, of course, help us. I don't know of a case in my experience, but what I felt was that we were at least getting an even break in the instances where those conditions prevail and I personally think if it was left to me to decide for the railroads, I would put it in everywhere I could. I am not informed of any circumstance or situation along our line where, in practice, there is a difference in treatment that might amount to discrimination to the extent that one industry is getting something in the way of service that another industry is not, or that might amount to a preference of one industry industry or class of industries over another. It is my understanding that it is our operating effort to treat all of these situations as nearly uniform as may be or as nearly alike as may be in those matters (11396–11401).

808 D. T. LAWRENCE, Chairman of the Trunk Line Association, called as a witness, and having been duly sworn, testified as follows (Vol. 11, p. 11401):

DIRECT EXAMINATION

My name is D. T. Lawrence. I am Chairman of the Trunk Line Association, but was never directly identified with that organization until September 8, 1932. I have served about 10 years with an affiliated organization and for about a year and three or four months it may be said in substance that I was an employee of the Trunk Line Association. I have had previous experience as General Freight Agent of the Lackawanna Railroad.

I have reviewed the files now under my jurisdiction, particularly with relation to the terminal allowance question (p. 11402):

CROSS-EXAMINATION

I am not able to answer your question as to the number of applications for allowance on our docket which have been undecided.

There are a very few, if any, such applications coming now. I do not know the number of such applications which have been filed and declined within the period since 1924. I would not think there were a hundred, 50 or 25. I am guessing. The fact is, these things would not in the ordinary course of events be decided by the Freight Traffic Managers' Committee if it was decided that no allowance would be made. They would be stopped in the ordinary course of events before that. The individual carriers would look into it.

There have been no allowances made to other than steel industries in the time which you mention, since 1924, with the exception
809 of an allowance to the Standard Oil Company of New Jersey at Bayonne. That was not done with the recommendation of the committee. It was done entirely by the carriers serving the plant. I don't know that there have been some applications declined. The decision as to whether an allowance should be made to an industry other than iron and steel in trunk line territory is in the hands of the trunk line executives. There has been no such thing there since the middle of July 1931 (p. 11403).

I heard the testimony of Mr. Eysmans in Pittsburgh. Coming back to the sense and meaning of the term "rainbow tariff" as used by Mr. Eysmans. I applied my own meaning to it. I don't particularly recall that Mr. Eysmans used the term "rainbow" in connection with the tariff. I thought he used it in connection with a report made by a committee of which he was chairman. I cannot positively identify that letter (Exhibit C–66) as in the files of the Eastern Committee. I do not know whether the subject was ever docketed for consideration by the Trunk Line Executive Committee or any action taken on it.

I cannot identify that particular letter you show me. I will read from it:

"'At meeting of Traffic Executive Association, Eastern Territory, on July 18, 1929, the following resolution was adopted:

"'In view of the conditions under which arrangements for plant facility allowances have been developed, it was the *the* concensus of the Traffic Executive Association:

"'A. That such allowances should be limited to iron or steel industries, and

"'B. Should be on the 1915–1916 cost basis.

"'In the event that any departure from the foregoing is deemed advisable, the proposal, with all of the facts, should be presented to the Traffic Executive Committee having jurisdiction, for review, prior to any investigation of costs (fol. A–9657) or approval or recommendation of the proposed arrangement.'

"That ends that. At a meeting of the Traffic Executive Association, Eastern Territory, on February 4, 1930, certain questions were presented and interpretations given as follows:

810 "'1. Whether, under the foregoing, the Territorial Traffic Executive Committee might delegate authority to a subor-

dinate committee to investigate and act finally on application for plant facility allowance for other than the iron or steel industries.

"'2. Whether action might be taken by a Territorial Traffic Executive Committee with respect to plant facility allowances to iron and steel industries, when the proposed allowance is not to be based on 1915–1916 costs.'

"Following discussion, it was decided as to these questions:

"'1. To reaffirm the conclusion that as to allowances to other than iron or steel industries, the Territorial Traffic Executive Committee should not delegate its authority to initiate investigation concerning application for plant facility allowances.

"'2. That full jurisdiction as to such allowances, whether for iron or steel plants or other industries, shall rest with the Territorial Traffic Executive Committee, subject to appeal to this association.'

"Now, in explaining all of that, I will just give you our set-up. There is a Trunk Line Traffic Executive Committee (fol. A–9658), with jurisdiction over the trunk line territory. There is a Central Traffic Executive Committee with jurisdiction over central territory. There is a Traffic Executive Association, Eastern Territory, with jurisdiction over the whole territory, to which questions affecting the whole territory and questions of conflict between the two territories may be referred" (pp. 11407–11408).

I do not know what the considerations were underlying that action just described (11408).

I cannot tell you as to whether that was on account of some failure to observe the rules that have been formally adopted in respect to that matter. The inclination to grant allowances to industries other than iron or steel industries was greater in central freight territory than in trunk line territory. That was the general arrangement back in 1922 at that time in trunk line territory. It had been generally observed in trunk line territory. In central freight territory it has not been observed so well, but I cannot tell you just what the situation was in 1922 in Central Freight Association
811 territory. As to what was the object to try and obtain a greater degree of uniformity in reference to that particular question throughout the whole official classification territory, it is difficult for me to say what was the objective in the minds of say 20 men of adopted such a resolution by a majority vote. I would not say that our records do not show the reason for docketing that question in May 1927. The reason for docketing would be that someone had brought it to our attention, and what he said, I don't know, but I take these resolutions upon their face. It is difficult to know just what is in the minds of men (p. 11408).

The chairman of the Traffic Executive Association was called upon in 1927 to make some inquiry with reference to the number of allowances that were made to other than the iron and steel industry, and the number of them that were on the basis of other than the 1915–1916 costs. The request was made by some of the member lines and was carried out. I have the result of that in the form of

an exhibit. (The document was thereupon received in evidence and marked "Respondents' Exhibit C–197.") In the trunk line section of this exhibit there are but two industries that are not iron or steel industries. One of these is the Standard Oil of New Jersey, Bayonne, $2.10 per car. That allowance was not passed upon by any committee or the Association. It was put in independently by the roads serving Bayonne, their statement being that the arrangement for the Standard Oil Company to do this business was more economical for them and they desired to save the money.

This statement outlines the situation as it existed on December 11, 1928. There has been no revision of the statement. There have been a few plant facility allowances made since that time none of which are iron or steel industries.

Going back to this Exhibit C–197, there was an undertaking
812 to ascertain what plant facility allowances were being made at that time (pp. 11409–11410).

There was at least one conference of trunk line traffic accounting and operating officers to consider the proposal of the Central Freight Association for the procedure to be followed in the consideration of applications for allowances to plant facilities. I cannot verify the date and do not know who was chairman of the conference. I can't positively identify what you state purports to be a copy of a memorandum of that conference. I cannot verify the date you mention but do know there was such a conference. I do not know who was present. That is a matter of record in our files. I could not state the proposals in detail that were before that conference for consideration. The trunk lines had a formula that looked rather good to them and the Central Freight Association lines had a formula which they seemed to prefer, and while I am not able to tell you what the difference between the formulae were, there was (p. 11411) an apparent thought that the two territories ought to work on one formula. That seemed to be a very logical idea, and the territories are now and have been working under one formula.

The following statement with reference to certain recommendations of The Central Freight Association Special Committee was read by Mr. Hagerty, Counsel for the Interstate Commerce Commission.

"Among others was this (1) that this basis be uniformly adopted by all groups and districts in the United States for the purpose of determining allowances to plant facilities.

"2. That consideration be given to placing all industries upon the same basis with respect to plant facility allowances, thus removing any discrimination that might exist as between classes of industry.

813 "3. That allowances granted in future, as well as any revisions of existing allowances, shall be based on the true operating conditions in the plant, and computed at current costs, and shall also be subject to review from time to time and readjustment when conditions justify" (p. 11412).

I recall having read a recommendation and I believe everything you have read sounds familiar. I cannot identify the date and cannot say definitely that just those words were used. I presume they were. Those recommendations were never adopted in toto. Obviously, the trunk lines and the Central Freight Association Committee had no control over the question as to the adoption of any formula within the United States, and the recommendation that it be extended to all industries has never been adopted by the trunk lines.

Mr. Hagerty, Counsel for the Commission, reading:

"'The view expressed at the conference of February 4, 1927, that it would be desirable to have uniformity in the formula for arriving at the basis for allowances as between trunk line and C. F. A. territory, was formed, as it has been (fol. A–9666) impossible for the committee, accounting and operating officers to submit the recommendation as contemplated by action of the conference of February 4, 1927, it being the view that the matter is one that should be passed upon by the accounting committee; the proposed C. F. A. formula was referred to the special accounting committee on terminal studies for review and recommendation.'

"That is the end of the quotation and has reference to recommendation No. 2. Now, with respect to recommendation No. 2:

"'This involving primarily a question of traffic policy, the question was referred to the traffic committee. The traffic committee representatives, therefore, recommended that the allowances made by the carriers to plant facilities be restricted to iron and steel industries.'

"Now with respect to recommendation No. 3:

"'This question will be covered by the recommendation of the accounting committee'" (p. 11413).

The document read by Mr. Hagerty was received in evidence and marked "Commission's Exhibit C–198, Witness Lawrence" (p. 11414).

814 I am not in position to positively identify the paper which you exhibited to me as an extract from the proceedings of the Traffic Executive Association, official territory, dated July 19, 1928, in reference to plant facility allowances. This is a resolution for the collecting of information and the exhibit is the result of a resolution very similar if not identical to Exhibit C–197. (The document was received in evidence and marked "Commission's Exhibit C–199, Witness Lawrence.")

The two questions which that exhibit indicates were open in 1928, were finally disposed of as per resolution of the Traffic Executive Association, eastern territory, on July 18, 1929, and interpretations thereof by the same body on February 14, 1930, which I have already read into this record. I have the formula that the accounting officers are using now. It was put in use about April 1928.

As to what changes have been made since I cannot inform you. I do not know what date it was revised in its present form. It represents the efforts of the accounting committee. Mr. Wagner became

chairman of the accounting committee in April 1928, and he proceeded to work up this formula in proper shape as the accounting committee considered it. Whether any changes have been made since that date or not I do not know; if that is the formula, they are using it. If there have been any changes made they are embodied in that formula. Mr. Wagner gave this to me about a week ago as the formula they are now using and this is an exact copy of what he gave me. (The document was thereupon received in evidence and marked "Commission's Exhibit C–200, Witness Lawrence.")

These rules are the rules adopted by the accounting committee.

I do not find that the Traffic Executive Committee ever ap-
815 proved those identical rules. They embodied a lot of rules which have been effective in Central Freight Association and trunk line territories. As to whether it would be necessary to have the Traffic Executive Committee approve any working rules that the accounting committee might adopt, there is a question that depends upon how you look at it. Personally, I think the accounting committee having in mind what is to be accomplished is the committee which should make its own rules as to how it should ascertain costs. As a matter of actual practice the accounting officers make those rules and I cannot find that they have had them approved by the traffic executives.

By Mr. Hagerty, Counsel for the Interstate Commerce Commission:

"Q. For example, there is one significant change from the rules that were in force, July 18, 1929, identified on this record as exhibit No. 106, and the rules that were in force March 3, 1931—became effective, identified on this record as exhibit No. C–65. That difference relates to the allocation of the time as between railroad service and plant service, bearing upon the weighing of cars at the scales. In exhibit C–65, rule No. 22, revised to March 3, 1931, reads:

"'When cars are switched from or to interchange track, and by order of plant authority are weighed enroute, the (fol. A–9673) time of weighing only shall be charged to the plant, provided the scale location is in line of progression of movement and the balance of the time charged to the railroad. When necessary to divert the movement in order to reach the scale, the scale shall be considered the interruption or interference point and time thereafter charged to the plant' (p. 11417).

"That is the present rule, is it not?

"A. That is the present rule.

"Q. Section 18, rule No. 10, in effect July 18, 1929, embodied in exhibit No. 106, states that in order to apportion between the railroad and plant the time of weighing cars, the tariffs or rules of the interested railroads must be consolidated. On cars weighed for information or account of the plant, the scale is the point of interruption or interference.

"And down further in sub-section A, section 20, it is provided that the time consumed in moving inbound loaded cars from the interchange track scale is chargeable to the railroad. Time consumed in moving these cars to scales, the point of unloading, is chargeable to

the plant. I think that is a somewhat different rule than the one adopted under revision of March 3, 1931, in exhibit C–65. I am wondering if that was a matter that was just postponed by the
816 Accounting Committee and changed in that particular, or did it have the consideration of some of the traffic officers or operating officers (fol. A–9675).

"A. If such a change took place, as you say, my answer is that I cannot find that it was ever passed upon by the traffic officers. I would further express the opinion that the change is a perfectly logical one, regardless of who made it" (pp. 11418 and 11419).

I would not know what would constitute, for example, the kind of interference described in the formula. The accounting and operating committees, I presume, would work that out. Certainly the traffic executives did not work it out. I should say this accounting committee is an operating committee working under the general direction of a traffic committee on those matters. In view of the fact that the traffic executives have passed upon the subject as to the granting of allowances, I do not see that the traffic committee can interfere very much with the accountants in applying accounting methods to such an ascertainment. The accounting committee's action would be perfectly innocuous without the traffic executives' intention to make an allowance, but in so far as ascertaining the measure of that allowance it seems to me it is an accounting matter. The general measure and extent of the terminal services that the railroads would pay for at any of these industrial plants was pretty well laid down for the accounting committee. The general substance of it was that the expense of interchange was to be charged to the railroads; other expense was to be charged to the plant. The question of interference came in there, and delay caused by interference to be charged to the plant. Now, certainly the auditors are people who are qualified to take those things into account and see what they amount to.

I cannot find that it was the traffic department or the traffic committee that outlined to the accounting committee the limitations
817 of service described in this formula for which the railroads would pay. It is reasonable to presume that the auditing committee worked it out with the operating committee (p. 11421).

I do not know of the traffic executives having approved the rules that are embodied in the formula for determining the amount of plant facility allowance—that is, either the rules that were in effect on July 18, 1929 as identified by Exhibit No. 6 and those revised to March 3, 1931, as identified by Exhibit C–65, or those embodied in Exhibit C–200–65 which you have placed in evidence. Let me tell you what my understanding of this is. When a plant is to be scouted to see if a plant facility allowance should be made and, if so, how much, the accounting committee meets at the plant with the operating officers of the railroads interested and the plant. They have their conferences, they look the matter over and they see what interference or what special conditions are effective at that plant. Now,

from considerable experience in the handling of individual plants they get the information which enables them to draw the individual rules, but nevertheless each plant is looked over before the men start to take the time. I cannot tell you any more than I have about it (pp. 11422–11423).

I do not wish to have it appear from my testimony that there was any friction over this question between the traffic executives and the freight traffic managers, or between the traffic executives and the accounting committee. They were all officers of the same railroads.

I know that in the consideration of this question from time to time that the accounting officers and the traffic officers and the operating men tried to give each other the benefit of their experience and to work together for the common good.

At the request of Mr. Burchmore, Counsel for National Industrial Traffic League, Mr. Lawrence produced the following
818 letter which appears in the record at page 11427:

File 549.

TRAFFIC EXECUTIVE COMMITTEE, EASTERN TERRITORY,
143 Liberty Street, New York,
July 20, 1920.

GENTLEMEN: In connection with the question of increased revenues, the enclosed proposition has been offered.

Will you kindly consider this matter, treating the same as confidential, reporting to me your views.

It is self-evident that a matter of this character should not be made public and that no discussions of same with shippers should be had before a conference is held and some action is taken one way or another.

Very truly yours,

TRAFFIC EXECUTIVE COMMITTEE, EASTERN TERRITORY,
J. GOTTSCHALK.

(fol. A–9688) Enclosure copy

MEMORANDUM

(a) Freight rates as published will apply between public stations of carriers.

(b) The delivery to a private siding, or the taking of a car from a private siding, involves special switching, and should be charged for in addition to the rate. Such delivery is of more value to the owner of the traffic, because it avoids the haul from the freight station and saves the expense thereof, so that it would seem proper to make a reasonable charge for this store-door delivery of the traffic or taking the traffic from the store-door.

(c) The taking of a car from, or delivery to, a private siding would include only the movement of the car to the extent of what is defined as "simple switching" in the Commission's decision in the U. S. Cast Iron Pipe & Foundry Case, and for any service within

the plant beyond such "simple switching" a proper charge should be made.

(d) A charge of $2 for taking a car from, or placing it on, a private siding would be much cheaper than if hauled from a public freight station, and it would not seriously depreciate the value of a private siding; nor would it, to any extent, tend to crowd the public freight station (fol. A–9689).

819 (e) It is estimated there are about 75,000,000 movements to and from private sidings per annum, which serves as a basis for accruing additional revenue by making such a charge.

(f) As a recollection of Mr. Brandeis' theory in the first Five Per Cent Case, it was his claim that the handling of cars to and from private sidings was discrimination in favor of the owners of these sidings as against the small shipper who had to use the public freight station, and that the service of store-door delivery was valuable; the serious difficulty being that while in point of principle, the number of shippers now owning private sidings is tremendously greater, in point of tonnage the private siding owners are equally in excess. Moreover, the private siding owners are organized, as the membership of the N. I. T. L., the various Chambers of Commerce, Traffic Associations, etc., are almost all owners of private sidings, while the very large number of shippers not owning private sidings are not so organized.

(g) Where a freight rate is advanced, the shipper has ready means of applying the advanced rate to his prices, but where a service is charged for, it is difficult for him to add this, or at least it is much more indefinite so that the real antagonism against a charge for private siding delivery is on the ground that shippers cannot pass this on to be distributed among the customers, but must assume it as an additional expense of operation (fol. A–9690).

(h) The Florida East Coast R. R. has consistently applied this principle, and because of its consistency has been successful in defending it, their charge being $2 or $2.50 per car for each movement to or from a private siding (11428).

The letter of September 17, 1920, contained in Exhibit C–39 addressed to the National Industrial Traffic League, signed by Mr. Eysmans, as chairman, is in our file. I do not have that file with me. I presume I can produce the reply received to that letter if it was replied to in writing (p. 11429). (Examiner Bardwell.) (Let it be understood then that the letter dated September 20, 1920, will be furnished.

A document headed Traffic Executive Committee, Eastern Territory, 143 Liberty Street, New York, December 22, 1922, subject "Allowances to industrial roads and plant facilities" addressed to the Traffic Executives Committee, Eastern Territory, was received in evidence and marked "Exhibit C–201, Witness—Lawrence."

820 Standard Brands, Incorporated

R. R. LUDDECKE, General Traffic Manager, Standard Brands, Incorporated, was called as a witness, having been duly sworn, testified as follows (Vol. 11, p. 11482):

DIRECT EXAMINATION

I am General Traffic Manager of Standard Brands, Incorporated.

(A map showing the plant layout was received in evidence and marked "Respondents' Exhibit C-205, Witness Luddecke.")

All of the loads in and out are placed on interchange tracks where they are picked up and delivered by the New York Central, and we do all of the switching with our own power.

CROSS-EXAMINATION

We have always performed our own switching—ever since the plant was built. Because of the curves we can't do anything else. When the plant was built it was also built for water and loading. A standard road engine or a switch engine could not negotiate the curves in the plant. Cars for this industry are set off on the interchange track at the convenience of the railroad and we go down and get them three or four times a day, as needed—clear the tracks every day.

This industry applied to the railroad for an allowance and was told that they did not give allowances to anything but iron and steel industries in the eastern trunk-line territory. This application was made April 22, 1931, and the declination was received August 22, 1931, in a letter addressed to R. R. Luddecke, General Traffic Manager, Standard Brands, Incorporated, 595 Madison Avenue,

821 New York City, as follows:

"With further reference to your letter of July 9th regarding terminal allowance, the granting of plant facility allowances to the iron and steel industries, it is an arrangement which has been in effect for a good many years. On numerous occasions efforts have been made by other companies to have plant facility allowances granted, but without success. In the Semmet-Solvay cases, the matter was submitted to the Interstate Commerce Commission on formal docket, and the Commission decided that the complainant was not entitled to compensation. The Interstate Commerce Commission also decided against the General Electric Company in a formal action brought before them, and the matter was then presented by the General Electric Company to the Appellate Division of the Supreme Court of the State of New York, who decided in favor of the shippers. However, the case was brought before the Court of Appeals who reversed the decision of the Appellate Division, and subsequent petition was made to the United States Supreme Court for writ of certiorari, which petition was denied.

"J. H. FRENCH,
"*Division Freight Agent.*"

FRED S. RISLEY, of Standard Brands, Incorporated, was recalled as a witness, having been previously sworn, testified as follows (Vol. 11, p. 11484):

DIRECT EXAMINATION

The plant of the Standard Brands, Incorporated, at Peekskill, N. Y., is on that part of the New York Central that comes within my jurisdiction, and I am familiar with the terminal services rendered by that railroad at this industry. To my knowledge the railroad has never been called upon to perform the services at this industry. I have no knowledge of the plant facility of the industry, but I understand that the physical characteristics are such that the railroad could not perform the service if called upon to do so. I understand from Mr. Luddecke that the reason the railroad cannot perform the switching within this plant is because of some of the physical conditions in connection with the track, such as curves, or rail, or maintenance (11484–11485).

822 In United States District Court

No. 3110 In Equity, No. 3111 In Equity, No. 3112 In Equity, No. 3113 In Equity, No. 3130 In Equity, No. 3136 In Equity

[Titles omitted.]

Stipulation as to record from I. C. C.

Filed Jan. 11, 1936

It is stipulated and agreed by and between the petitioners in the above entitled causes and the United States and Interstate Commerce Commission as respondents:

1. That the exhibits received in evidence by the Interstate Commerce Commission in the proceeding known as Ex Parte No. 104, Terminal Services of Class I Carriers, Part II, Terminal Services, of which copies certified by the Secretary of the Interstate Commerce Commission are this day filed in evidence before the court, *nunc pro tunc* as of the 22nd day of October, 1934, are all of the exhibits offered before the Interstate Commerce Commission which it is necessary for the court to have and consider in the determination of the issues raised in these causes:

2. That the several exhibits bearing the following numbers, likewise received in evidence by the Commission in said proceeding and of which copies are not filed under the certificate of the Secretary,
823 are not necessary for the court to have before it in passing on the issues:

Numbers 2 (in part), 5, 6, 8, 10, 11, 13, 15, 17, 29, 34, 41, 44, 45, 48A, 49, 50 (in part), 52, 55, 57, 59, 60, 62X, 62Y, 62xx, 63, 64, 65, 66, 67, 69, 76, 77, 78, 85, 86, 87, 88, 89, 91, 95, 100, 102, 107, 108, 109,

110, 110, 118, 126, 127, 140 (in part), 145, 150 (in part), 157, 159, 160, 163, 169, 173, 191, 192, 250, 252, 266, 273, A5X, A 11 and A 150.

3. That of the original exhibits received in evidence by the Commission bearing colors, only those numbered A–23, A–24, A–27, A–37, A–46, A–70, A–71, A–72, A–94½, A–99, A–103, A–107, A–136, A–159, C–11, C–59, C–61, C–71, C–97, C–111, C–126, C–147, C–153, C–156, C–158, and C–165, have been reproduced in the colors shown on the original, by direction and agreement of counsel.

4. That the twelve printed volumes of transcript and the certified exhibits as hereinabove described and referred to constitute the full record of evidence before the Interstate Commerce Commission, in so far as is necessary for the court to have the record before it in passing on the issues.

This the 11th day of January, 1936.

AMERICAN SHEET & TIN PLATE COMPANY,
By DAVID A. REED AND
REED, SMITH, SHAW & MCCLAY,
Its Solicitors.

ALLEGHENY STEEL COMPANY,
By WILLIAM W. COLLIN, JR.,
JOHN S. BURCHMORE,
Its Solicitors.

PITTSBURGH PLATE GLASS COMPANY,
By WILLIAM W. COLLIN, JR.,
JOHN S. BURCHMORE,
Its Solicitors.

WEIRTON STEEL COMPANY,
By WILLIAM W. COLLIN, JR.,
JOHN S. BURCHMORE,
Its Solicitors.

WEST LEECHBURG STEEL COMPANY,
By WILLIAM W. COLLIN, JR.,
JOHN S. BURCHMORE,
Its Solicitors.

UNITED STATES OF AMERICA,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
Its Solicitor.

INTERSTATE COMMERCE COMMISSION,
By DANIEL W. KNOWLTON,
Its Solicitor.

[File endorsement omitted.]

824 In United States District Court

No. 3110 In Equity, No. 3111 In Equity, No. 3112 In Equity, No. 3113 In Equity, No. 3130 In Equity, No. 3136 In Equity

[Titles omitted.]

Order consolidating cases

Filed Oct. 22, 1935

And now, this 22nd day of October 1935, pursuant to stipulation of counsel in open court, it is ordered that the trials of the above entitled six cases shall be consolidated and that they shall be heard and determined upon one Record.

J. WARREN DAVIS,
Judge of the United States Circuit Court of Appeals.
R. M. GIBSON,
F. P. SCHOONMAKER,
District Judges.

[File endorsement omitted.]

825 In United States District Court

Equity No. 3110, Equity No. 3111, Equity No. 3112, Equity
826 No. 3113, Equity No. 3130, Equity No. 3136

[Titles omitted.]

Statement of evidence at final hearing on petitions for injunction

Filed Dec. 19, 1935

Before Hon. J. Warren Davis, Judge of Third Circuit Court of Appeals; Hon. Robert M. Gibson, District Judge; Hon. F. P. Schoonmaker, District Judge.

And now, Tuesday, October 22, 1935, at 10:00 the above entitled causes came on for hearing before the above named Judges, at Pittsburgh, Pennsylvania.

Transcript of offic itl notes of hearing. Harriet Cole Thomas, Official Reporter.

827 Counsel present: Messrs. Reed, Smith, Shaw & McClay (By David A. Reed, Esq.), Representing American Sheet & Tin Plate Company; Messrs. Walter, Burchmore & Belnap (By John S. Burchmore, Esq.) Messrs. Patterson, Goehring, McClintock & Collin (By William W. Collin, Jr., Esq.), Representing Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company and West Leechburg Steel Company; Elmer Collins, Esq., Assistant to Attorney General, Representing United States of America; Daniel W. Knowlton, Esq., Chief Counsel Interstate Commerce Commission.

Colloquy

Judge DAVIS. Gentlemen, we have three or four cases here this morning.

Mr. REED. There are six cases, I think, Your Honor.

Judge DAVIS. Senator, is the question practically the same as involved in all of them?

Mr. REED. Yes, Your Honor; and we have prepared and are going to ask the Court to sign an order consolidating the trials and providing for a single record to be used in all six cases.

Mr. BURCHMORE. May it please the Court, in one of these cases, the Pittsburgh Plate Glass Company against the United States
828 and Missouri Pacific Railroad et al., the last filed, No. 3136 Equity, there has been no interlocutory injunction. You have granted interlocutory injunctions in the other five cases at previous sessions of the court. It will be manifestly impossible to decide this last case before the order of the Commission takes effect. We should like to present a motion for interlocutory injunction before Your Honors and speak briefly to it before we take up these other five cases.

Judge DAVIS. Is there any reason why, whatever we decide the questions involved in the five, that the other case should take a different course than the five?

Mr. COLLINS. Well, I don't think there is, Your Honor. That case is, as Mr. Burchmore says, one of the Pittsburgh Plate Glass Company cases. I should think, however, we should discuss the case and present it on both the motion for interlocutory injunction and for final injunction; in other words, there would be a complete submission——

Judge DAVIS. But it seems to me the interlocutory part would be wasting time, if we are going to hear the merits. I see no reason why it should not take the same course as the others have taken.

Mr. COLLINS. Well, Your Honors have heard our arguments in the other cases on the interlocutory injunction and have
829 rejected them.

Judge DAVIS. Yes; and I think to argue that phase of it would be consuming unnecessary time.

Judge GIBSON. I understand by that you mean that the hearing can be as if the evidence were introduced today.

Mr. BURCHMORE. May we ask: It will be understood that the Court will sign an interlocutory injunction decree in this last case?

Judge DAVIS. Yes.

Mr. REED. May it please the Court, I present to the Court and ask that it may be filed as part of the record stipulation of the parties in the case of American Sheet & Tin Plate Company, agreeing that the record of the hearing of the Interstate Commerce Commission shall, when the printing of it is completed, be certified and filed with the court nunc pro tunc. The printers have been unable to finish it; as Your Honors will see, they have finished a great mass of printing, but it will be another thirty days or so before it will all be done. This stipulation has been signed by counsel for the Government and for the Commission.

Judge DAVIS. It may be filed.

830 Mr. REED. Then may I present to the Court and ask for the entry of an order that the trials of these six cases be consolidated, and that they be heard and decided on a single record? That

I believe must be signed by all the judges of the court—we were not certain about that.

Judge DAVIS. That order may be submitted.

Mr. COLLINS. If the Court please, you have entered an order consolidating the cases for trial; there has been submitted to the Court a stipulation entitled only in the one case that the record shall be filed later nunc pro tunc. It is agreed in open court that the action under that stipulation applies to all the cases.

Judge DAVIS. So we understand.

Mr. BURCHMORE. Now, on final hearing, in support of the prayers for decrees enjoining and setting aside all orders of the Commission, we offer in evidence in these six cases, first, all those portions of the Bills which are not denied by the Answers, and which I believe under the practice of this court are therefore receivable in evidence.

Mr. REED. Perhaps it would be helpful if it were specified in a typical case what is admitted. In the case of the American Sheet & Tin Plate Company (Equity No. 3110), there would be cov-

831 ered by this offer of evidence which Mr. Burchmore has made:

Paragraph 1, the averments as to the incorporation of the plaintiff; its business, its location of its plants, and other details regarding the plaintiff.

Paragraph 2, describing the incorporation and business of the Pennsylvania Railroad Company.

And then a study of the Answers indicates that the Interstate Commerce Commission has not specifically answered a number of averments, that the Government has directly admitted many of them. This case ought not to be tried on technicalities, it seems to me, and so far as the Sheet & Tin Plate Company case, I do not ask the Court to accept in evidence anything that is not specifically admitted.

Paragraph 7 of this particular Bill of Complaint avers the making and filing of the terminal allowance tariffs that were laid to this particular plaintiff. It is not denied by either defendant, and I think is specifically admitted by the Interstate Commerce Commission, and therefore we feel warranted in offering that in evidence; as well as Paragraph 8, which deals with the cancellation of those tariffs in pursuance of this general ruling of the Interstate Commerce Commission. Those matters, technically necessary and not denied, I think should be offered in evidence.

Judge GIBSON. When the record is prepared, it should be

832 understood that the reporter will write those sections in, so that the Court will have them for ready reference.

Mr. REED. Yes, Your Honor.

Judge DAVIS. There will be no objection; I assume?

Mr. COLLINS. No objection.

(The respective paragraphs of the several Bills of Complaint just above offered, read as follows:)

Offers in evidence

No. 3110 Equity. American Sheet & Tin Plate Company vs. United States of American and Pennsylvania Railroad Company. Paragraph 1:

"(1) American Sheet & Tin Plate Company (hereinafter called the 'plaintiff') is a corporation organized and existing under the laws of the State of New Jersey, having its principal operating office in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania. Plaintiff is engaged in the business of manufacturing steel, which said business is carried on at plants located throughout the United States, including plants at Vandergrift and Scottdale, Pennsylvania, and Wellsville, Ohio. In the conduct of its business, plaintiff receives various commodities in carload shipments moving in interstate commerce to plaintiff's plant at Vander-
833 grift, Pennsylvania, from points of origin in the United States outside of the Commonwealth of Pennsylvania, and ships various commodities from said plant, in carload shipments, to points of destination in the United States outside of the Commonwealth of Pennsylvania. Heretofore, similar shipments were received at and made from its plants at Scottdale, Pennsylvania, and Wellsville, Ohio, but said plant at Scottdale, Pennsylvania, is not now operating and said plant at Wellsville, Ohio, is being dismantled."

Paragraph 2:

"(2) Pennsylvania Railroad Company (hereinafter called the 'defendant carrier') is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and other states, and has its principal place of business in the City of Philadelphia, Pennsylvania. Said defendant carrier is a common carrier by railroad of interstate commerce and as such is subject to the provisions of the Interstate Commerce Act. It owns and operates lines of railroad within the Commonwealth of Pennsylvania, and receives interstate freight for delivery at plaintiff's plant at Vandergrift, Pennsylvania, and in like manner receives freight for delivery at
834 its said Vandergrift plant for transportation to interstate destinations."

Paragraph 7:

"(7) On April 28, 1917, defendant carrier issued, effective June 1, 1917, its tariff No. AA–I. C. C. No. 879, and duly filed the same with the Commission in accordance with the provisions of section 6 of the Interstate Commerce Act, providing for the payment of an allowance to plaintiff for the latter's transportation service of moving and placing cars at loading and unloading points in its plant, and reading as follows:

"'Pennsylvania Railroad Company, Philadelphia, Baltimore & Washington Railroad Company, West Jersey & Seashore Railroad Company

"'Local Freight Tariff

"'Terminal allowances to American Sheet and Tin Plate Company at Vandergrift, Pa., applying on coal and coke traffic to and from points on or reached via the Pennsylvania Railroad Company.

"'On all carload revenue shipments, destined to or coming from the plant of the American Sheet and Tin Plate Company, the latter company performs the terminal switching service for account
835 of the Pennsylvania Railroad Company.

"'The American Sheet and Tin Plate Company will be allowed for such service, out of the current Vandergrift, Pa., rate the actual cost of of service performed as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet and Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding $1.10[1] per car.

"'The foregoing arrangement does not include traffic handled under switching charges as named in Tariff C. and C.-P. S. C.-Pa.-No. 426, applicable on Bituminous and Cannel Coal, or reissues thereof. Effective June 1, 1917. Issued April 28, 1917, by H. C. Clevenger, Coal Freight Agent, Philadelphia, Pa.'

"The aforesaid tariff has at all times since June 1, 1917 been in effect, and defendant carrier has made the allowances strictly in accordance with the terms and conditions contained in said tariff.

"Similarly, defendant carrier on February 20, 1934, issued its tariff I. C. C. 1170, effective March 25, 1934, and superseding an earlier tariff of the same character, reading as follows:

"'Tariff 506-B

"'The Pennsylvania Railroad Company

"'Local Freight Tariff

"'Terminal allowances to American Sheet and Tin Plate Company at Vandergrift, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad.

836 "'On all carload revenue shipments, also on cars containing 6,000 pounds or more of less carload freight destined to or coming from plant of the American Sheet & Tin Plate Company, the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company.

"'The American Sheet & Tin Plate Company will be allowed for such service, out of the current Vandergrift, Pa. rate, the actual cost of service performed, as specified in monthly bills computed

[1] Reduction.

and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet & Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding $1.10 per car.

"'When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car. The allowance for each additional car in the series or lot will be fifty five (55) cents or fifty (50) percent of the allowance for the first car, except that in instances where cars are loaded to their full or safe carrying capacity, the per car allowance of $1.10 will be made for each car.

"'On cars containing excess shipments of carload freight handled under Rule 24 of the Official Classification, I. C. C.–O. C. 52, P. S. C.–Pa.-O. C. 52 (A. H. Greenly, Agent), supplements thereto or successive issues thereof, the allowance will be fifty-five (55) cents or fifty (50) percent of the allowance for the first car.

"'The foregoing arrangement does not include traffic handled under switching charges named in Pennsylvania Railroad Tariff I: C. C. 691, P. S. C.–Pa. 384, supplements thereto or successive issues thereof; nor on traffic handled under Pennsylvania Railroad Local Freight Tariff P. S. C.–Pa. 290 (Agent's Index 88) or successive issues thereof; nor on shipments of Slag, Ashes or Other Refuse Material for Wasting, as named in Agent B. T. Jones' Tariff 226-B, I. C. C. 1695, P. S. C.–Pa. 97, supplements thereto or successive issues thereof.

"'Will not apply on coal or on coke (the product of coal) or on ex-lake iron ore. Issued February 20, 1934. Effective March 25, 1934.'

837 "Said tariff I. C. C. 1170 and earlier tariffs of the same character were duly filed with the Commission and have been in effect for many years.

"The allowance provided by said tariffs is less than the cost to plaintiff of performing the aforesaid terminal services and is less than it would cost the defendant carrier to perform the services with its own engines and employees, and such allowance is in all respects just, reasonable and lawful."

Paragraph 8:

"(8) Defendant carrier has filed with the Interstate Commerce Commission and Public Service Commission of Pennsylvania a cancellation notice designated Supplement 1 to AA–I. C. C.–879, effective August 22, 1935, withdrawing and cancelling said tariff and the allowance to plaintiff therein provided for. Said cancellation notice provides as follows:

838 "'The Pennsylvania Railroad Company

"'Cancellation Notice

"'AA—I. C. C. 879. C. and C.—P. S. C.—Pa. 620

"'Local Freight Tariff

"'Terminal allowances to American Sheet and Tin Plate Company at Vandergrift, Pa., applying on coal and coke traffic to and from points on or reached via the Pennsylvania Railroad Company is hereby cancelled.

"'Terminal Allowances Discontinued

"'Issued July 17, 1935, by: G. P. Shaw, chief of Tariff Bureau, 15 N. 32nd Street, Philadelphia, Pa. Effective August 22, 1935. In compliance with Eighteenth Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104, Part 2. July 5, 1935.'

"Similarly defendant carrier has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a cancellation notice designated Supplement 1 to I. C. C. 1170, effective August 22, 1935, withdrawing and cancelling
839 said tariff and the allowance to petitioner therein provided for. Said cancellation notice provides as follows:

"'Cancellation Notice, Tariff 506-B

"'The Pennsylvania Railroad Company

"'Local Freight Tariff

"'Terminal allowances to American Sheet & Tin Plate Company at Vandergrift, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company is hereby cancelled.

"'Allowance Discontinued

"'Issued in compliance with Eighteenth Supplemental Report and Order of the Interstate Commerce Commission in Ex-Parte 104, Part 2, decided July 5, 1935. Issued July 18, 1935. Effective August 22, 1935.'

"Defendant carrier has given to plaintiff no reason for the aforesaid cancellation of allowances except the issuance of said order of the Commission dated July 5, 1935, Exhibit C herein, and by virtue of the statement upon said cancellation notices that the same are given in compliance with said order of the Commission, plaintiff alleges that the defendant carrier would not have filed said
840 notices cancelling said allowances were it not for the compulsion of said order of the Commission and the fear of incurring penalties upon failure to comply therewith."

No. 3111 Equity. Allegheny Steel Company vs. United States of America and The Pennsylvania Railroad Company. Paragraph I:

"I. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, with principal office at Pittsburgh in said Commonwealth and in the Western District of Pennsylvania, and owning and operating a plant at Brackenridge, Pennsylvania, where it is now, and for many years past has been, engaged in the manufacture of steel and steel alloy products; and in the conduct of said business it receives at its plant large quantities of ore, coal, limestone, and other raw commodities and other materials, and ships large quantities of manufactured steel and alloy products from said plant."

Paragraph II:

"II. Respondent The Pennsylvania Railroad Company is a common carrier of property by railroad between Brackenridge,
841 Pennsylvania, and points in other states, and as such common carrier is subject to the Interstate Commerce Act, and owns and operates lines of railroad within Pennsylvania and other states, and transports interstate freight for delivery to petitioner's plant at Brackenridge, Pennsylvania, and in like manner transports freight from said plant to destinations in other states."

Paragraph IX:

"IX. At all times since July 15, 1930, the duly filed and published tariff of respondent the Pennsylvania Railroad Company has been in force, providing payment of allowance by respondent to petitioner for the latter's transportation service of moving and placing cars at loading and unloading points in its plant, and said tariff currently effective provides as follows:

"'The Pennsylvania Railroad Company

"'Local Freight Tariff

"'Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company.'

842 "On all carload revenue shipments, also on cars containing 12,000 pounds or more of less carload revenue freight, destined to or coming from the plant of the Allegheny Steel Company, the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are loaded in said plant.

"For such terminal service performed for the Pennsylvania Railroad Company by the Allegheny Steel Company, the latter will be allowed One Dollar and Seven Cents ($1.07) per loaded car, which will include the handling of the empty cars in the reverse direction.

"This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period February 26 to March 7, 1930, inclusive, and filed with the Interstate Commerce Commission.

"When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car, the allowance for each additional car in the series or lot will be Fifty-four (54) cents or fifty (50) per cent of the allowance for the first car.

"On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.–O. C. 50, P. S. C. Pa. O. C. 50 (D. T. Lawrence, Agent), supplements thereto or successive issues thereof, the allowance will be Fifty-four (54) cents or fifty (50) per cent of the allowance for the first car.

"The foregoing arrangement does not include traffic handled under switching charges as named in G. O. I. C. C. 14296, G. O. P. S. C. Pa. 4798 (Agent's Index 54), supplements thereto or successive issues thereof; nor on shipments of slag, ashes or other refuse material for wasting, as named in Agent B. T. Jones' I. C. C. 1695, P. S. C. Pa. 97, supplements thereto or successive issues thereof.

843 "The foregoing tariff also contains provisions excluding coal, coke and ore but a similar tariff provides for like allowance on coal and coke."

Paragraph X:

"X. Respondent has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a tariff to become effective August 1, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner, as follows:

"'Cancellation Notice

"'The Pennsylvania Railroad Company

"'Local Freight Tariff

"'Terminal allowances to Allegheny Steel Company at Brackenridge, Pa., on traffic to and from points on or reached via the Pennsylvania Railroad Company is hereby canceled.

"'Allowance Discontinued

"'Issued in compliance with Eleventh Supplemental Report and Order of the Interstate Commerce Commission in Ex Parte No. 104, Part 2, decided July 7, 1935.'

"Similar tariff has been filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania

844 cancelling the tariff which provides for allowance on coal and coke, effective the same date.

"Respondent has given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of June 7, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent would not have filed the aforesaid tariff cancelling said allowance were it not for the fear of incurring penalties for failure to comply with said order."

No. 3112 Equity. Pittsburgh Plate Glass Company vs. United States of America and The Pennsylvania Railroad Company. Paragraph I:

"I. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, with principal office at Pittsburgh in said Commonwealth and in the Western District of Pennsylvania, and owning and operating a plant at Ford City, Pennsylvania, where it is now and for many years past has been engaged in the manufacture of plate glass and other glass products; and in the conduct of said business it receives at its plant large quantities of sand, coal, limestone and other raw com-
845 modities and other materials, and ships large quantities of plate glass and related products from said plant."

Paragraph II:

"II. Respondent The Pennsylvania Railroad Company is a common carrier of property by railroad between Ford City, Pennsylvania, and points in other states, and as such common carrier is subject to the Interstate Commerce Act, and owns and operates lines of railroad within Pennsylvania and in other states, and transports interstate freight for delivery to petitioner's plant at Ford City, Pennsylvania, and in like manner transports freight from said plant to destinations in other states."

Paragraph IX:

"IX. At all times since September 14, 1927, the duty filed and published tariff of respondent the Pennsylvania Railroad Company has ben in force, providing payment of allowance by respondent to petitioner for the latter's transportation service of moving and placing cars at loading and unloading points in its plant, and said tariff currently effective provides as follows:

846 "'The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East West Jersey and Seashore Railroad Company.

"'Local Freight Tariff

"'Terminal allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached via The Pennsylvania Railroad Company.

"'On all carload revenue shipments, also on cars containing 12,000 pounds or more of less carload revenue freight destined to or coming from the plant of the Pittsburgh Plate Glass Company, Ford City, Pa., on which the latter Company performs the terminal switching service for account of the Pennsylvania Railroad Com-

pany, the Pittsburgh Plate Glass Company will be allowed, out of the current Ford City, Pa., rate, 65 cents per car.

"'When articles on account of length require two or more cars to transport them, the allowance stated above will be applied to the first car. The maximum allowance for each additional car in the series or lot will be fifty (50) per cent of the maximum for the first car.

"'On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.—O. C. No. 48, P. S. C.—Pa. O. C. No. 48 (D. T. Lawrence, Agent), supplements thereto or reissues thereof, the maximum allowance will be fifty (50) per cent of the maximum allowed on the first car.

"'The foregoing arrangement does not include traffic handled under switching charges as named in G. O.—I. C. C. No. 14296, G. O.—P. S. C.—Pa.—No. 4798 (Agent's Index No. 54),
847 supplements thereto or reissues thereof; nor on shipments of Slag, Ashes, or other refuse material for wasting, as named in Agent B. T. Jones' I. C. C. No. 1695, P. S. C.—Pa.—No. 97, supplements thereto or reissues thereof.'

"The foregoing tariff also contains provision excluding coal, coke, and ore but a similar tariff provides for like allowance on coal and coke."

Paragraph X:

"X. Respondent has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a tariff to become effective August 22, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner, as follows:

"'Cancellation Notice

The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East)

"'Local Freight Tariff

"'Terminal allowances to Pittsburgh Plate Glass Company at Ford City, Pa., on traffic to and from points on or reached by The Pennsylvania Railroad Company is hereby cancelled.

"'Allowance Discontinued

"'Issued in compliance with Seventeenth Supplemental
848 Report and Order of the Interstate Commerce Commission in Ex-Parte 104, Part 2, decided June 25, 1935.'

"Similar tariff has been filed with the Interstate Commerce Commission and Public Service Commission of Pennsylvania cancelling the tariff which provides for allowance on coal and coke, effective the same date.

"Respondent has given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of June 25, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent would not have filed the aforesaid tariff cancelling said allowance were it not for the fear of incurring penalties for failure to comply with said order."

No. 3113 Equity. Weirton Steel Company vs. United States of America and The Pennsylvania Railroad Company. Paragraph I:

"I. Petitioner is a corporation duly organized and existing under the laws of the State of Delaware, with principal office at Pittsburgh in the Commonwealth of Pennsylvania and in the Western District of Pennsylvania, and owning and operating a plant at
849 Weirton, West Virginia, where it is now and for many years past has been engaged in the manufacture of steel products; and in the conduct of said business it receives at its plant large quantities of ore, coal, limestone, and other raw commodities and other materials, and ships large quantities of manufactured steel and related products from said plant."

Paragraph II:

"II. Respondent The Pennsylvania Railroad Company is a common carrier of property by railroad between Weirton, West Virginia, and points in other states, and as such common carrier is subject to the Interstate Commerce Act, and owns and operates lines of railroad within Pennsylvania and in other states, and transports interstate freight for delivery to petitioner's plant at Weirton, West Virginia, and in like manner transports freight from said plant to destinations in other states."

Paragraph IX:

"IX. At all times since August 15, 1929, the duly filed and published tariff of respondent The Pennsylvania Railroad Company has provided for payment of allowance by respondent to petitioner if the latter performed the transportation service of moving
850 and placing cars at loading and unloading points in its plant, and said tariff provides as follows:

"'The Pennsylvania Railroad Company

"'Local Freight Tariff

"'Terminal allowances to Weirton Steel Company at Weirton, W. Va., on traffic to and from points on or reached via the Pennsylvania Railroad Company.

"'On all carload revenue shipments, also on cars containing 10,000 pounds or more of less-carload revenue freight, destined to or coming from the plant of the Weirton Steel Company, the latter company performs the terminal switching service for account of The Pennsylvania Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company

and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

"'For such terminal service performed The Pennsylvania Railroad Company by the Weirton Steel Company, the latter will be allowed one dollar and twenty-three cents ($1.23) per loaded car, which will include the handling of the empty cars in the reverse direction.

"'This allowance is not in excess of the average actual cost of the service as disclosed in cost study of the operation of the plant facility made during period February 6 to February 12, 1929, inclusive, and filed with the Interstate Commerce Commission.

"'When articles on account of length require two or more
851 cars to transport them, the allowance stated above will be applied to the first car, the maximum allowance for each additional car in the series or lot will be sixty-two cents ($.62), or fifty (50) per cent of the maximum for the first car.

"'On cars containing excess shipments of carload freight handled under Rule 24 of Official Classification, I. C. C.-O. C. No. 49, P. S. C.-W. Va.-O. C. No. 49 (D. T. Lawrence, Agent), supplements to or successive of said publication, the maximum allowance will be sixty-two cents ($.62), or fifty (50) per cent of the maximum allowed on the first car.

"'The foregoing allowances will not be made on Ex-Lake Iron Ore, nor on traffic handled under local transportation charges as named in Pennsylvania Railroad Company Tariff 134-A, I. C. C. F-2025 (P. S. C.-W. Va. F. 65) (Tariff File C-54), nor on shipments of Slag, Ashes or other refuse material for wasting, as named in Agent B. T. Jones' Tariff I. C. C. 1695 (W. Va. 90) (Penna. Tariff File C-105), supplements to or successive issues of said publication.'"

Paragraph X:

"X. Respondent has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania a tariff to become effective August 22, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner, as follows:

852 "'Cancellation Notice

"'The Pennsylvania Railroad Company (Lines Pittsburgh, Pa., Oil City, Pa., Erie, Pa., and East)

"'Local Freight Tariff

"'Terminal allowances to Weirton Steel Company at Weirton, W. Va., on traffic to and from points on or reached by The Pennsylvania Railroad Company is hereby cancelled.

"'Allowance Discontinued

"'Issued in compliance with Fifteenth Supplemental Report and Order of the Interstate Commerce Commission in Ex Parte 104, Part 2, decided June 24, 1935.'

"Respondent has given to petitioner no reason for the aforesaid cancellation of Allowance except the issuance of said order of June 7, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent would not have filed the aforesaid tariff canceling said allowance were it not for the fear of incurring penalties for failure to comply with said order."

853 No. 3130 Equity. West Leechburg Steel Company vs. United States of America and The Pennsylvania Railroad Company. Paragraph I:

"I. Petitioner is a corporation duly organized and existing under the laws of the State of Pennsylvania, with principal office at Pittsburgh, Pennsylvania, in the Western District of Pennsylvania, and owning and operating a plant at Leechburg, Pennsylvania, where it is now and for many years past has been engaged in the manufacture of steel products; and in the conduct of said business it receives at its plant large quantities of ore, coal, limestone and other raw materials and other commodities, and ships large quantities of manufactured steel products from said plant."

Paragraph II:

"II. Respondent The Pennsylvania Railroad Company (hereinafter at times referred to as carrier respondent or railroad respondent) is a common carrier of property by railroad between Leechburg, Pennsylvania, and points in other states, and as such common carrier is subject to the Interstate Commerce Act; and said carrier respondent owns and operates lines of railroad within Pennsylvania and in other states, and transports freight in interstate com-

854 merce for delivery to petitioner's plant at Leechburg, Pennsylvania, and from said plant to destinations in other states."

Paragraph IX:

"IX. At all times since November 25, 1927, the duly filed and published tariff of the railroad respondent has provided for payment of allowance by said respondent to petitioner for performance of the transportation service of moving and placing cars at loading and unloading points in petitioner's plant."

Paragraph X:

"X. Respondent carrier has filed with the Interstate Commerce Commission and the Public Service Commission of Pennsylvania tariff to become effective September 16, 1935, providing for the cancellation of the aforesaid tariff naming allowance to petitioner.

"Respondent carrier has given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of July 29, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent carrier would not have filed the aforesaid tariff cancelling said allowance were it not for the fear of incurring penalties for failure to

855 comply with said order."

No. 3136 Equity. Pittsburgh Plate Glass Company vs. United States of America, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company. Paragraph I:

"I. Petitioner is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, with principal operating office at Pittsburgh in said Commonwealth and in the Western District of Pennsylvania, and owning and operating a plant at Crystal City, Missouri, where it is now and for many years past has been engaged in the manufacture of plate glass and other glass products; and in the conduct of said business it receives at its plant large quantities of said, coal, limestone, and other raw commodities and other materials, and ships large quantities of plate glass and related products from said plant."

Paragraph II:

"II. Respondents, Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company are common carriers of property by railroad between Crysfal City, Missouri, and points in other states, and as such common carriers are subject to the
856 Interstate Commerce Act, and own and operate lines of railroad within Missouri and in other States, and transport interstate freight for delivery to petitioner's plant at Crystal City, Missouri, and in like manner transport freight from said plant to destinations in other states."

Paragraph IX:

"At the present time and for several years past each of respondent carriers herein has maintained its duly filed and published tariff providing for said payment to petitioner for the latter's transportation service of moving and placing cars at loading and unloading points in its plant."

Paragraph X:

"X. Respondent carriers have filed with the Interstate Commerce Commission their respective tariffs to become effective October 31, 1935, providing for the withdrawal and cancellation of the aforesaid allowance to petitioner.

"Respondent carriers have given to petitioner no reason for the aforesaid cancellation of allowance except the issuance of said order of September 12, 1935, by the Interstate Commerce Commission, and petitioner upon information and belief alleges that respondent carriers would not have filed the aforesaid tariffs cancelling said
857 allowance were it not for the fear of incurring penalties for failure to comply with said order."

Colloquy

Mr. BURCHMORE. We now offer in evidence a certified copy of the entire transcript of testimony before the Interstate Commerce Commission. Only six volumes—there will be twelve—have been completed by the printer. We have here for official inspection a copy of six volumes. We offer this, together with all of the exhibits received before the Commission, excepting that we have an agreement with counsel for the Government—which will be reduced to formal stipulation at the time the exhibits are actually presented—and that in essence is that there are certain exhibits which both sides agree

would be very difficult and expensive to print and are not necessary for the Court to consider, or relate to matters of which you would take judicial notice.

Judge DAVIS. You need not offer physical exhibits.

Mr. BURCHMORE. This offer applies to all six cases, and on this testimony—I should perhaps pause to inquire whether the Government offers any testimony?

Judge DAVIS. Now, Mr. Burchmore, I ask you and other counsel why you are offering these twelve volumes. I assume there is a lot of it that is absolutely immaterial to the decision in this case, and it would be a waste of time for the Court to read these twelve volumes to find out what parts are pertinent to this decision. And we expect you gentlemen in your briefs to point out the portions of the testimony upon which you rely.

Mr. BURCHMORE. Your Honor, the necessity is this——

Judge DAVIS. I understand the necessity perfectly well, but I am trying to expedite our labors.

Mr. COLLINS. It is understood we will make references in our briefs to what we think is sufficient testimony to support orders in each case.

Judge DAVIS. That is, the portions upon which you rely?

Mr. COLLINS. Yes.

Mr. BURCHMORE. Now, if the Court please, I realize you desire the case to be fully presented, and yet we should fulfill our desires to be brief; it will not be over an hour that I will address you. I shall be as brief as possible.

Judge DAVIS. How many of the cases do you represent?

Mr. BURCHMORE. I speak for the petitioner in five of the cases. Senator Reed and I will discuss the arguments on behalf of the petitioners. There is no difference between us.

Mr. REED. None at all.

Judge DAVIS. And I suppose you will not overlap and repeat.

Mr. REED. I promise Your Honors not to do that; I don't think I will take ten minutes.

Judge DAVIS. Let me ask the Government about the time they desire.

Mr. COLLINS. Well, I think a discussion which would be sufficiently thorough to be helpful to the Court should be permitted.

Judge DAVIS. Then we will give you an hour.

Mr. COLLINS. However, Mr. Knowlton, the chief counsel of the Commission, has intervened and is prepared to discuss the cases on behalf of the Commission as an intervenor.

Judge DAVIS. That may be, but we don't want him to cover the same ground you cover; that will be unnecessary.

Mr. COLLINS. I do not understand that he intends to.

Judge DAVIS. And so you and he can divide the time; we will give you the same time we give the other side; they have the laboring oar.

Mr. COLLINS. Your Honors, we have a couple of items of evidence here, matters that we want to offer in evidence. One is a certified

copy, photostatic copy, of the notice sent out by the Commission to different parties of the hearings held in connection with these Pittsburgh cases, and describing the subject matter to be examined into by the Commission when the hearing convened——

Mr. BURCHMORE. There is no objection.

Judge DAVIS. There is no objection; let it be admitted.

Mr. COLLINS. The other is a memorandum containing excerpts from brief filed before the Commission on behalf of the National Industrial Traffic League at the conclusion of and upon the evidence taken by the Commission in the hearings, having relation to the adequacy and sufficiency of the hearings already conducted by the Commission——

Judge DAVIS. You say briefs?

Mr. COLLINS. It is excerpts from a brief.

Judge DAVIS. And contained in the paper which you have there?

Mr. COLLINS. Yes; just two little sheets.

861 Mr. BURCHMORE. I would suggest, if any part is offered in evidence, I think the whole brief should be considered by the Court.

Mr. COLLINS. I am willing to have the whole brief go in, but I have no copy of it myself.

Mr. BURCHMORE. It doesn't seem to me a matter of evidence.

Judge DAVIS. Well, gentlemen, it is not a matter of evidence, and I hardly see how we could admit it, unless you gentlemen agree.

Mr. REED. Well, reserving the right to object, if the Court please,—would counsel be willing to have go into evidence at the same time the brief filed by the counsel for the Interstate Commerce Commission, Mr. Haggerty and Mr. Gwynn?

Mr COLLINS. Well, let me explain first just why I am offering this. The allegations in some, if not all, of these Bills challenge the sufficiency of the hearing; at least they make the bald allegation that the order is void, because sufficient notice of hearing was not given by the Commission to the parties; and, the excerpts from the brief filed by the National Industrial Traffic League comment upon the adequacy and fullness of the hearing already held at a time

862 when it was critically important for him to make a claim that the hearing should be extended, that is, that the Commission should hold further hearings; instead, there were rounded compliments of the Commission for having already held such a full hearing, rather than an objection to the hearing already held.

Judge DAVIS. Well, as I understand it, all that means is the opinion of counsel who wrote that brief.

Mr. COLLINS. In my judgment, Your Honor, it means a little more than that; that he was waiving ——

Judge DAVIS. How could it mean more than that?

Mr. COLLINS. Waving an opportunity, or suggestion at least, that he wanted further hearing or further opportunity.

Judge GIBSON. None of the parties, though, in this case were involved in that.

Mr. REED. No; I do not see how that could bind us.

Judge GIBSON. So it could not be an admission of any of the parties here.

Mr. REED. We have a brief ourselves, rendered by counsel for the Interstate Commerce Commission, in this very proceeding, in which their own counsel say they have no case, that nothing wrong
863 has been shown on these hearings. Now, if counsel will agree to let both briefs go in, I think the Court may get some light from the two of them.

Mr. COLLINS. We will withdraw the offer.

Mr. REED. You won't agree to let them both go in?

Mr. COLLINS. I will withdraw this.

(Oral arguments presented by counsel for the respective parties.)

864 *Reporter's certificate*

I hereby certify that the foregoing pages contain a correct transcript of all the evidence taken in the proceedings of final hearing on petitions for injunction, in the cases of Nos. 3110, 3111, 3112, 3113, 3130, and 3136, In Equity; together with the offers of counsel, the objections thereto, the rulings thereon and the exceptions thereto.

HARRIET COLE THOMAS,
Official Reporter.

PITTSBURGH, PENNSYLVANIA,
December 16, 1935.

865 *Order approving statement of evidence*

We, the undersigned Judges, sitting in the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto, rulings thereon and exceptions thereto, taken upon final hearing on petitions for injunction in the cases at Nos. 3110, 3111, 3112, 3113, 3130, and 3136, in Equity; all of which, so certified, is ordered to be filed and to become a part of the record this 18th day of December, 1935, at Pittsburgh, Pennsylvania.

R. M. GIBSON,
F. P. SHOONMAKER,

866 In United States District Court for the Western District of Pennsylvania

No. 3110 In Equity

AMERICAN SHEET & TIN PLATE COMPANY

vs.

UNITED STATES OF AMERICA

No. 3111 In Equity

ALLEGHENY STEEL COMPANY

vs.

UNITED STATES OF AMERICA

No. 3112 In Equity

PITTSBURGH PLATE GLASS COMPANY

vs.

UNITED STATES OF AMERICA

No. 3113 In Equity

WEIRTON STEEL COMPANY

vs.

UNITED STATES OF AMERICA

No. 3130 In Equity

WEST LEECHBURG STEEL COMPANY

vs.

UNITED STATES OF AMERICA

No. 3136 In Equity

PITTSBURGH PLATE GLASS COMPANY

vs.

UNITED STATES OF AMERICA, ET AL

Before Circuit Judge J. Warren Davis; District Judges R. M. Gibson and F. P. Schoonmaker.

Opinion

Filed May 23, 1936

SCHOONMAKER, District Judge: The six above entitled cases involving similar issues were brought under the Act of Congress of October 22, 1913 (38 Stat. at Large 219); 28 U. S. C. A., Secs. 41 (28) 45, 46, 47, to enjoin orders of the Interstate Commerce Commission requiring railroad companies to discontinue payments of allowances to plaintiffs for the performance of certain terminal service commonly called "spotting."

867 These cases were heard before J. Warren Davis, Circuit Judge; R. M. Gibson and F. P. Schoonmaker, District Judges.

By agreement of counsel in open court, the trials of these six cases were consolidated; they were heard and are to be determined on one record.

The orders of the Interstate Commerce Commission involved in these suits were entered in a proceeding entitled "Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services."

The specific orders involved in these suits were issued respectively in connection with supplemental reports to that in "Ex Parte No. 104", dealing with the terminal practices obtaining at the particular industrial plants of the plaintiffs, as follows:

American Sheet and Tin Plate Company Terminal Allowance, 209 I. C. C. 719, July 5, 1935.

Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273, June 7, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467, June 25, 1935.

Weirton Steel Company Terminal Allowance, 209 I. C. C. 445, June 24, 1935.

West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213, July 29, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527, September 12, 1935.

The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows: American Sheet & Tin Plate Company, Vandegrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Breckenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and The West Leechburg Steel Company at Leechburg, Pennsylvania.

868

All of these plants are served by the Pennsylvania Railroad Company, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis, San Francisco Railway Company, common carriers engaged in interstate commerce.

At each of plaintiffs' plants, terminal switching is performed in connection with the receipt and delivery of freight under the provisions of duly filed and published railroad tariffs.

We quote from a typical tariff (Pennsylvania R. R. Tariff), effective June 1, 1917, applying to coal and coke traffic switched by American Sheet & Tin Plate Company at Vandegrift, as defining this switching service:

"On all carload revenue shipments, destined to or coming from the plant of the American Sheet and Tin Plate Company, the latter

company performs the terminal switching service for account of the Pennsylvania Railroad Company.

"The American Sheet and Tin Plate Company will be allowed for such service, out of the current Vandegrift, Pa., rate, the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet & Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding $1.10 per car."

869 The defendant railroad, pursuant to the several recited orders of the Interstate Commerce Commission, undertook to cancel and discontinue these switching allowances by tariffs, the wording of the tariff for the American Tin Plate Company at Vandegrift being typical of all:

"The Pennsylvania Railroad Company—Cancellation Notice—Local Freight Tariff—Terminal Allowances to American Sheet and Tin Plate Company at Vandegrift, Pa. * * * is hereby cancelled. Terminal allowances discontinued. Effective August 22, 1935. In compliance with Eighteenth Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104, Part 2, July 5, 1935."

The plaintiffs contend that these cancellation orders are unlawful because this "spotting" terminal switching service is a transportation service which the railroads are required by law to perform, and if the plaintiffs themselves perform it, they are entitled to compensation from the railroads. The Interstate Commerce Commission, on the other hand, contends that this service is not transportation service, because that service lawfully ends when the Railroads deliver the car for loading or unloading at the interchange or holding switch of the plant being served, and therefore the service complained of is a device to make an unlawful rebate to shippers.

The plaintiffs contend that the line-haul tariff rates cover not only delivery of cars to the interchange track of the industry, but also the delivery of cars beyond that point on a system of tracks leading to mills and warehouses, and "spotting" them at convenient points for loading and unloading; and that if the plaintiffs perform that service they are entitled to an allowance from the Railroad Company for that service.

870 The Interstate Commerce Commission contends that the line-haul tariff rate is for delivery of the freight car only at the interchange switch, and that the Railroad cannot be called upon either to "spot" freight cars at mill and warehouse platforms or to pay the shipper for doing what is exclusively its own work.

The question to be decided in the instant case is therefore whether the switching done by the plaintiffs within their own plants between the interchange or storage tracks and the platforms of their mills and warehouses is work that the Railroads are required to do as a part of transportation.

There appears to be no exact formula that can be applied in answering this question. The most that we can get from the decided cases is that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable: Mitchell Coal & Coke Co. vs. Pennsylvania R. R. Co., 230 U. S. 247, 263; New York Central & H. R. R. R. Co. vs. General Electric Co., 114 N. E. 115, 117.

The Interstate Commerce Act (U. S. C. A., Title 49, C. 1, Sec. 1 (3), Definitions, defines "transportation" thus:

"• • • The term 'transportation', as used in this chapter shall include locomotives, cars, and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, • • • and handling of property transported. • • •"

"This section further provides in the succeeding paragraph that 'It shall be the duty of every common carrier to provide and furnish such transportation upon reasonable request therefor.'"

871 However, it is certain that "spotting service" is "transportation" within this definition, and therefore a common-carrier service up to certain limits, and includes the placement of cars in position accessible to the consignors and consignees respectively for loading and unloading. By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right of way, and also on private industrial tracks off the carriers' right of way and on the private property of the industries served. Such services are included in the established rates, unless in express terms the published tariffs otherwise provide: Car Spotting Charges, 34 I. C. C. 609.

We, therefore, reach the conclusion that "spotting services" are recognized in law as common-carrier service to which the shippers are entitled, and which the carriers are in duty bound to perform. In fact, the courts have held that writs of mandamus and mandatory injunctions will lie to enforce this right and compel this duty: Missouri Pacific R. R. Co. vs. Larabee Flour Mills Co., 211 U. S. 612.

It is also certain that the carriers may either do this "spotting service" themselves or engage others, including shippers and owners of property transported to do it, and pay therefore a reasonable compensation out of their freight rates, without violating the law: Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Company, 230 U. S. 247. But this will not include special or particular "spotting service" such as described in New York Central & Hudson River R. R. Co. vs. General Electric Company, 114 N. E. 115, over an intricate system of trackage when the Railroad is not permitted to enter to extend any "spotting service" at all.

872 Typical of the circumstances which relieve the carrier from the duty of "spotting" cars may be noted: (a) where an industry refuses to permit the Railroad to enter upon the private industrial tracks; (b) where the physical condition and lay-out of the private

industrial tracks will not accommodate the carrier's locomotive power without hazard or excessive delay; (c) where the industry occupies large areas with many scattered plants, connected by an intricate system of industrial tracks and used chiefly as industrial facilities.

In the instant cases, we find no circumstances which would relieve the carriers involved from the duty of "spotting" the cars as a part of the transportation imposed upon them by law. We further find that such "spotting service" is covered by the Railroads' published tariffs, and is a part of the line-haul freight charge, and that where the plaintiffs do this "spotting service" themselves, they are entitled to the compensation provided for in the published freight tariffs.

Commissioner Mahaffie, dissenting from the majority report of the Commission, has in his report contained in the exhibits attached to the plaintiffs' petitions in the instant cases, clearly stated why the cease-and-desist orders issued by the Commission in the instant cases are not based on the jurisdictional findings necessary to support these orders and that the injunction sought should be granted in all these cases.

As we view the law, the Commission was without power to prohibit entirely allowances for doing "spotting service." It could review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful: Section 15 (par. (1) and (13)) of Interstate Commerce Act; Interstate Commerce Commission vs. Louisville & Nashville Railroad Company, 227 U. S. 88, 92; Southern Pacific Company vs.
873 Interstate Commerce Commission, 219 U. S. 433; Interstate Commerce Commission vs. Stickney, 215 U. S. 98, 105; Interstate Commerce Commission vs. Northern Pacific Railway Company, 216 U. S. 538, 544; United States vs. Baltimore and Ohio Railroad Company, 293 U. S. 454.

No such findings were made in the instant cases. The courts have uniformly held that to support a cease-and-desist order by the Commission, it must make the necessary quasi-jurisdictional findings of fact, or the order is void; Florida vs. United States, 282 U. S. 191, 215; United States vs. Chicago, Milwaukee and St. Paul Railway Co., 294 U. S. 499.

Our conclusion is that the orders of the Commission complained of are beyond its statutory power, and that the injunction prayed for should issue.

Findings of fact, conclusions of law, and decree, in accordance with this opinion, may be submitted.

[File endorsement omitted.]

874–1 In United States District Court

No. 3110 in Equity, No. 3111 in Equity, No. 3112 in Equity, No. 3113 in Equity, No. 3130 in Equity, No. 3136 in Equity

[Titles omitted.]

Plaintiffs' requested findings of fact and conclusions of law on consolidated record

I. Findings of Fact

The foregoing six cases having been heard and tried, by agreement of counsel, on one consolidated record, embracing the record before the Interstate Commerce Commission and other relevant evidence, upon due consideration the Court enters the following findings of fact:

874–2 1. The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows: American Sheet & Tin Plate Company, Vandergrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Brackenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and the West Leechburg Steel Company at Leechburg, Pennsylvania. All of these plants are served by the Pennsylvania Railroad Company, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company, common carriers engaged in interstate commerce.

2. At each of plaintiffs' plants, terminal switching is performed in connection with the receipt and delivery of freight under the provisions of duly filed and published railroad tariffs, which provide that the industry will perform the terminal switching service for account of the railroad company and that the industry will be allowed for such service, out of the current freight rates, the actual cost for service performed but not exceeding specified amounts per car.

874–3 3. By long continued custom and practice of both carriers and shippers such terminal switching service, namely, the placement of cars in position accessible to consignors and consignees respectively for loading and unloading, is part of the transportation service which the carriers are obliged to perform under the compensation afforded by the published freight rates.

4. The carriers have not provided in their published tariffs any separately established charges for such terminal switching services to be exacted in addition to the published freight rates.

5. That in each of the present cases the terminal switching service performed is covered by the railroads' published tariffs, and is a part of the line-haul freight charge, and where the plaintiffs have been engaged by the railroad companies to do this "spotting service" themselves, they are entitled to the allowances provided for in the published freight tariffs.

6. In the present cases, none of the industries has refused to permit the railroad to enter upon the industrial tracks; the physical condition and layout of the industrial tracks will accommodate the locomotive power of the carriers without hazard or excessive delay; and the industries receiving the allowances do not occupy large areas with many scattered plants, connected with an intricate system of industrial tracks and used chiefly as industrial facilities.

7. In the present cases there was no substantial evidence to support a conclusion that the so-called interchange tracks at any
874-4 of these industries are points where the cars would be either accessible or convenient for loading by the consignor or unloading by the consignee.

8. There was no evidence of record before the Commission tending to show that the allowance in any of these cases was excessive.

9. In none of the present cases was there any finding of the Commission that the allowance is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, nor was there any substantial evidence on which the Commission could have based such findings.

II. Conclusions of Law

Upon the consolidated record in these cases and the foregoing findings of fact, the Court enters the following conclusions of law:

1. The placement of cars at reasonably convenient and accessible places for loading or unloading within industrial plants, including those of plaintiffs, is a common carrier service to which shippers are entitled, and which the carriers are in duty bound to perform, and is a transportation service under the Interstate Commerce Act, particularly under paragraph (3), section 1, thereof. Certain extraordinary circumstances, not present in these cases, may relieve or limit this obligation.

2. The carriers may either perform this "spotting service" themselves or engage others, including shippers and owners of
874-5 property transported, to do it, and pay therefor a reasonable compensation out of their freight rates, without violating the law.

3. Such an allowance to a shipper, when provided in a published tariff of the carrier, cannot be considered as a rebate or in violation of Section 6 of the Interstate Commerce Act.

4. A practice of a carrier may not be condemned because of the fact that it is beneficial to the shipper as well as the carrier.

5. The Commission was without power to prohibit entirely allowances for doing "spotting service."

6. To support a cease-and-desist order by the Commission, it must make the necessary quasi-jurisdictional findings of fact, that the rate or practice complained of was unreasonable, unjustly preferential, unduly discriminatory or otherwise unlawful, or the order is void.

7. The orders of the Commission in the present cases are beyond its statutory power and should be set aside.

Circuit Judge.

District Judge.

District Judge.

Entered June —, 1936.

875 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112,
876 In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

Findings of fact and conclusions of law, requested by the United States and Interstate Commerce Commission

The six above-entitled cases were brought under the Act of Congress of October 22, 1913 (38 Stat. L. 219, 28 U. S. C. A. Secs. 41, 45, 46, 47, 47a) to enjoin orders of the Interstate Commerce Commission requiring the railroad companies named therein to discontinue payments of allowances to plaintiffs for the switching and "spotting" of cars within their respective industrial plants, or from performing such service without charge in addition to the line-haul rates. The cases having been consolidated for hearing, and having been heard by J. Warren Davis, Circuit Judge, R. M. Gibson and F. P. Schoonmaker, District Judges, upon one record consisting of the
877 pleadings and the testimony and exhibits submitted to the Commission in the course of hearings conducted by it, the Court, pursuant to Equity Rule 70½, makes the following findings of fact and reaches the following conclusions of law:

Findings of fact

1. Plaintiffs are all corporations with offices and places of business located in the Western District of Pennsylvania.

2. The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows: American Sheet & Tin Plate Company, Vandegrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Breckenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and The West Leechburg Steel Company at Leechburg, Pennsylvania. All of these plants are served by the Pennsylvania Railroad Com-

pany, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis, San Francisco Railway Company, common carriers engaged in interstate commerce.

3. The proceeding, entitled Propriety of Operative Practices—Terminal Services, 209 I. C. C. 11, in which the six orders in controversy were issued, is Part II of an investigation instituted July 6,
878 1931, upon the Interstate Commerce Commission's own motion "into practices of carriers affecting operating revenues or expenses, which for convenience was divided into different parts." The Commission's investigation was undertaken under section 13 (2) of the Act, which inter alia, provides that the Commission may institute proceedings on its own motion as to any matters concerning which a complaint is authorized, "or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." Section 12 (1) of the Act provides that the Commission may inquire into the management of the business of the carriers, that it shall be its duty to keep itself informed as to the manner and method in which their business is conducted, and that "the Commission is hereby authorized and required to execute and enforce the provisions of this Act." Part II of the proceeding related to the "spotting" of cars at industries. The matters investigated in that part of the proceeding are stated as follows in the Commission's report (209 I. C. C. 11, 15).

"Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at such further hearings. The principal questions to be determined, as indicated in the later notices, are as follows:

"1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform. This question relates to three distinct methods of rendering such services, including:

"Group A, where the industries perform these services and receive compensation therefor from respondent carriers.

879 "Group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers, and

"Group C, where respondent carriers perform the services at the special convenience of the industries.

"2. Whether, in circumstances where such services are performed by the industries, any allowances made to the industries by connecting common carriers as compensation for such services, are lawful;

also why, in similar circumstances, no allowances are made to other industries for performing such services."

4. Hearings were held pursuant to notice by the Commission at practically all the larger cities of the country, a record of approximately 18,000 pages of testimony and more than 500 exhibits being made. During the course of the hearings testimony and evidence describing and relating to the service of so-called "spotting" of cars involved on the tracks of particular plants was taken, including those of plaintiffs herein, which together with the general evidence enabled the Commission to reach determinations and deal by supplemental reports with the practices of the carriers at particular industries or plants.

5. After concluding the hearings the Commission, on May 14, 1935, issued its first, or "main" report (209 I. C. C. 11), in which it discussed generally the historical and legal aspects of the "spotting" service and reviewed and discussed generally the facts disclosed in the record before it. Describing the "spotting" service, that report reads, in part (pp. 15–18):

"The service rendered in placing cars on and removing them from team tracks and private sidings is well known. It consists of the placing of cars at or their removal from a point on such tracks reasonably convenient to both the carrier and the shipper. A description of the service involved on tracks of individual industrial plants will be dealt with in subsequent reports, but in general it may be stated as follows: The industries heard on this record
880 have systems of tracks within their plants which vary in extent from a few tracks aggregating only a few hundred feet in length, to extensive systems many miles in length. These industries are served in one of two ways, i. e., inbound and outbound cars are delivered or received by the carriers on interchange[1] tracks which either compose an extensive yard or designated tracks from and to which interchange tracks the spotting[2] service is performed by locomotives belonging to the industry served, for which service in many instances the industry receives an allowance from the carrier while in other instances such service is performed by the industry at its own expense; or by the other method the spotting service is performed by the carrier. In the majority of such instances the spotting is performed by the carrier at its convenience and without interruption or interference by the industry. In other instances cars are first placed by the carrier on interchange tracks from which they are subsequently moved by a carrier engine or engines assigned to the plant and operating entirely under the direction of the industry and spotted when and as needed by the industry without charge in addition to the line-haul rate or switching charge otherwise applicable. At the latter group of industries the services are substantially the

[1] By "interchange" yards or tracks, as used herein, is meant the yards or tracks where cars are delivered to or received from an industry by the connecting carrier. In most instances these yards or tracks are on property of the industry.

[2] "Spotting" or spotting service, as used herein, is the service beyond a reasonably convenient point of interchange between road haul or connecting carrier and loading or unloading locations on industrial plant tracks.

same as at the industries where the spotting service is performed by plant power.

"This report will principally deal with the class of industries to which an allowance is paid by the carrier as compensation for rendering service which it is urged is within the obligation of the carrier under the line-haul rate, and those to which the carriers assign power to perform the spotting service. * * *

"Numerous other industries heard on this record use locomotives for the identical purposes and in the same manner, but receive no allowance therefor, although many of them have made attempts to secure payment for such services. * * *

"The published tariffs generally establish switching limits at the various destination points. Delivery within those limits is paid for when rates are collected to those destinations. In some cases the switching limits are definitely defined by boundaries, and at others the industries included within the switching district are named. There is no dispute that delivery at the various industries is covered by the published rate. The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a solution for that problem. The limitation of place within which delivery is due will vary with varying conditions.

All that we can safely say is that there must be such a de-
581 livery as is customary and reasonable. Delivery by railroad is usually effected either at freight houses or other terminals, and deliveries are still made at such places where the factories and warehouses of shippers and consignees do not connect with the tracks. Private sidings have become common and freight is carried over them between the railroad and the plant. Such carriage is commonly regarded as a part of the work of transportation. In most cases the distances are short and the carrier's burden remains substantially the same whether the cars are left upon the siding close to the main tracks or hauled along the siding until they reach the plant. In such circumstances it may be said with reason that delivery at the plant means delivery at the platform for loading and unloading. The respondents have not withheld service incidental to carriage between the railroad and the plant. Cars have been hauled from the main line to agreed interchange tracks either within the limits of the plant or on tracks in close proximity thereto. These interchange tracks correspond to the spurs or sidings on which the practice of spotting had its origin. What many of the industries here insist upon is that the respondents must haul them farther over an intricate system of interlacing tracks and distribute them among the mills and warehouses not at the convenience of the respondents but in order to meet the industrial needs of the plants. We come then to the test, which, vague as it is, is the only safe one, that is, whether in the light of all the circumstances such a form of delivery is customary or reasonable. * * *

"The tariffs publishing the line-haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction

provide for 'plant switching' or 'spotting of cars at unloading point' to be performed at plant's convenience."

6. The allowances paid by the railroads to the particular industries receiving them are published in tariffs, in the nature of exceptions to the line-haul rate-publishing tariffs of the railroads. The allowances are published and paid on the assumption that the spotting service is a "transportation" service, for performance of which the industries are entitled to compensation under the provisions of section 15 (13) of the Interstate Commerce Act. The following (Pennsylvania R. R. Co. Tariff) is typical of the so-called "allowance" tariffs applicable at industries of the plaintiffs:

882 "On all carload revenue shipments, destined to or coming from the plant of the American Sheet and Tin Plate Company, the latter company performs the terminal switching service for account of the Pennsylvania Railroad Company.

"The American Sheet and Tin Plate Company will be allowed for such service, out of the current Vandegrift, Pa., rate, the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet & Tin Plate Company and the Pennsylvania Railroad Company, but not exceeding $1.10 per car."

7. The Commission issued no order at the time of its main report, but its report announced certain principles concerning the payment of allowances to industries for performing spotting service at their industrial plants, or performance of such service by railroads in lieu of payment. These principles are stated in the syllabus of the report, as follows:

"Upon investigation into practices of carriers affecting operating revenues or expenses with relation to terminal service of Class I carriers by railroad, found that:

"1. When a carrier is prevented from performing an uninterrupted service to the points of loading or unloading within the confines of an industrial plant because of some action or disability of the industry or its plant, the carrier's duty with respect to the delivery or receipt of cars does not extend beyond the point of interruption or interference, and any allowance to the industry for performing the service beyond such points or the performance of service by the carrier beyond such points without proper charge is unlawful in violation of section 6 of the act.

"2. At many industries delivery and receipt of freight is effected by carriers on interchange tracks because of interference or interruption to the work of both the industry and the carrier which would be encountered beyond such tracks. Under such circumstances, delivery or receipt on such tracks constitutes delivery or receipt under the line-haul rates.

"3. When the spotting service at an industry requires a service in excess of that required in making simple placement or the equivalent of team track spotting, such service is in excess of that re-

quired of a common carrier under its line-haul rate, and any allowance to the industry for performing such service or the performance thereof by the carrier without charge over and above
883 the line-haul rate is unlawful in violation of section 6 of the act.

"4. The payment by respondents of allowances to individual industries for the performance of spotting service at the latter's convenience, or the assignment by respondents of locomotives to perform similar service without charge, dissipates respondents' funds and revenues, to be not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

8. The record fully discloses the development of the practice of the carriers over the country generally in performing the spotting service or in paying allowances therefor, and the evidence in this respect is correctly summarized in the following language of the Commission's main report:

"Their spread in Pennsylvania and Ohio was more rapid after the end of Federal control. In 1921, the first important allowance was granted in the Illinois-Indiana industrial region, and others rapidly followed extending into the lower part of the Mississippi Valley west of the river where allowances had previously been made to certain lumber companies as a result of the Tap Line Case, supra. Some allowances have been granted in the north central and extreme northwest sections and at present the only sections of the country where allowances are not paid are New England, the Southeast, and the extreme Southwest.

"The New England carriers maintain the position that allowances are improper; that if an industry specifies a yard or location where cars are to be interchanged, the placing or receiving of the cars at such location constitutes delivery or receipt by the carrier under its line-haul freight rates; and that a further movement by industrial locomotives is a matter of internal arrangements of such industry and is no concern of the carrier.

"Nearly all of the carriers south of the Potomac and Ohio rivers and east of the Mississippi have from the beginning resisted the payment of allowances. One of the vice presidents of a large southern carrier stated the position of his company with a reference to such payments substantially as follows: Speaking of a steel plant that had grown from a small industry through many years' operation, to a large industrial plant, he explained that in the beginning, the plant had required only a small amount of switching,
884 which was then performed by carrier locomotives. The growth of the industry later required the constant service of one, then three locomotives which were operated and controlled by the industry. At the time the constant service of the first locomotive was required for the plant's needs, the carrier considered its obligations under the line-haul rates ended when cars were interchanged at reasonably convenient points, and thereafter performed

no further service beyond such points. His testimony indicates recognition that a line of demarcation exists between the services included in transportation and those included in the industrial operations of a plant, and shows that this line should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires or disabilities of a plant.

"The position of this carrier is illustrative of that of the southern carriers generally. • • •

"The principal reason for the large increase since 1920, in allowances in the Chicago industrial area is the close relationship existing between the Elgin, Joliet & Eastern, one of the carriers serving many industries in that area, and a large industry which receives allowances at many of its plants in the East. Because of the dominating influence of the parent industry, this carrier was not averse to making allowances, and in so doing disregarded the rules which had been drawn for the guidance of all carriers in making allowances. Competing carriers were thus forced to the same ends to secure or retain traffic."

9. The Commission's main report correctly shows that numerous industries heard in the proceeding are neither accorded plant-spotting nor paid allowances (209 I. C. C. at pages 16 and 17). That this is a correct statement of the facts of record in this particular, will appear from the following illustrations:

a. Witness Waites, Supt., Southern Railway, said inter alia (R. 4648): There is a point beyond which the road-haul transportation does not require a carrier to go; that when a carrier cannot physically operate over plant tracks, it is improper to give the plant an allowance for performing the service. Witness Oliver, Vice President, Southern Railway, said that the responsibility of a rail-
885 road in connection with delivery ends at the plant interchange track (R. 4654, 4660, 4661). Throughout the testimony of Witness Porter, Inspector of Transportation, Louisville & Nashville Railroad, it is shown (R. 4787) that the railroad for which he was testifying, performed only the normal amount of service equivalent to team track switching (R. 4793 et seq., 4798) and would not perform plant service without compensation (R. 4807). The railroad makes no charge for original placement of cars and by such placement is meant direct movement of a car from railroad tracks to the loading or unloading points on industrial tracks (R. 4808). Witness Drescher, Assistant to Vice President, Louisville & Nashville, testified (R. 4810) that, under the circumstances outlined by him, when a railroad places an inbound car at a designated point of interchange, it has made the placement contemplated by the line-haul rate; that the plants served by his road receive no allowances for performing spotting service; that that policy is followed generally by southern carriers (R. 4813); that when placement is made at the designated point of interchange, the carrier's obligation under the line-haul rate is discharged (R. 4817); that a carrier is relieved

from obligation to place cars at interior points within the plant when plant disabilities prevent service at such points (R. 4818).

b. Mr. Younger, counsel for the Norfolk & Western, stated the position of that carrier to be that the spotting of cars upon the private tracks of industries having complicated track layouts was purely a plant service and beyond the obligation of a common carrier to perform, and not comparable to or the equivalent of spotting upon ordinary sidings; that the placing of cars upon the interchange tracks of such large industries is equivalent to spotting upon
886 ordinary sidings (R. 10873). Witness Teed, Superintendent of Terminals, St. Louis-San Francisco Ry. (R. 4832, 4838, 4839) stated that delivery is effected by placement of cars on an interchange track and no allowances are paid in the southern territories served by the St. Louis-San Francisco Railway. See also Witness Nash (R. 4840, 4841).

c. Witness J. H. Tallichet, General Counsel for the Texas & New Orleans Railroad Company (a defendant in certain of these suits), testified as to the obligation of carriers to perform industrial spotting. He believed that the allowances paid to the Magnolia and certain other oil companies were justified, but also plainly recognized (R. 5520), the limitations upon the carriers' obligation either to perform spotting service or pay allowances. He stated, among other things, that the service for which a carrier may lawfully give an allowance must not be beyond that for which the carrier is paid in the line-haul rate; that an industry is entitled to have its cars spotted only at a reasonable place, and a carrier's obligation does not require it to discharge the duties of plant operation (R. 5522); that a line must be drawn between transportation service and industrial service (R. 5524); that a carrier is not charged with any duty to help operate a plant and the circumstances and conditions at each particular industry must of necessity govern (R. 5526). As to whether plant disabilities, such as trackage conditions, relieve carriers from performing service within industrial plants, the witness stated: "It is a question of fact, or possibly a mixed question of fact and law, where the plant obligation begins and the carrier obligation ends, and I think it has to be settled in most instances on the facts in a particular case". (R. 5528).

887 d. In this connection the Commission properly considered the rules promulgated by the carriers' committees to govern the making of allowances (Ex. 106; R. 1340; Ex. 264; R. 3880). These rules are attached to the Commission's main report, Appendix A, and they are discussed in the report itself (209 I. C. C. 11, at pages 34 to 37). As there said, in substance, the rules for computing the amount of the allowance recognize that the carrier's obligation under its line-haul rate terminates where plant interferences are met with, a partial list of what constitutes such interferences being set forth. Rules 3 (c), 9 and 10, sec. 18. The opening paragraph of the rules state that: "In view of the conditions under which 'plant facility allowances have developed it was the consensus (a) that such

allowances should be limited to iron and steel industries * * *.'" The cases before this court show that allowances have not been limited to iron and steel industries; but they also show that plaintiffs for many years did their own spotting at their own expense.

e. The correspondence and memoranda embodied in this record as Ex. C-139, Witness Julius Eysmans, Vice President of the Pennsylvania Railroad (R. 9988), demonstrate the efforts made on the part of carriers in Official Classification territory to adopt a uniform policy which would settle the question as to the extent of service which the carriers should perform under the line-haul rates. The Commission's report correctly summarizes and discusses this exhibit and testimony; as follows:

"About 1920, a special committee of carriers operating in official territory made a study of the practices in that territory with respect to the spotting service. This special committee reported
888 that the practices were irregular and inconsistent and demanded a remedy. * * * It recognized that much of the service for which allowances were paid was service which was in excess of the carriers' obligations under their line-haul rates and proposed that a tariff be issued for account of the carriers in that territory. * * *

"The proposed tariff provided that where spotting service could not be performed on private or industrial sidings by means of one simple switching movement, a uniform charge should be applied for the remainder of the service; and that where an industry performed spotting service which was properly a carrier's duty, an allowance in an amount uniform to all such industries might be paid.

"Due mainly to the opposition of the National Industrial Traffic League, the proposed tariff was never published. This record shows that the irregularities, inconsistencies, and demand for remedial measures, which were found by the special committee to exist, still exist, and have since been greatly multiplied. As late as March 1931, the eastern carriers were attempting by change in their formula to obtain uniformity, and in August of that year, one of the largest eastern railroad systems declined to grant an allowance to a certain industry solely on the ground that it was not an iron and steel industry, although at that time and for a number of years previously this system and its component lines had been granting allowances to many industries regardless of the nature of their business."

f. The testimony of witnesses of record shows more than 100 industries which do their own plant spotting without receiving allowances from the carriers, and many other industrial plants performing their own spotting at their own expense are shown by returns to questionnaires, by exhibits, or by other evidence of record.

g. Turning to certain railroads whose lines serve the eastern industrial regions where the practice of making allowances is most prevalent: In exhibits showing inter alia what industries on their

lines did their own spotting without being paid allowances,
889 the Erie named two industries on one division, four industries on another division, four other industries on still another division, and four other industries on other lines (Exs. 82, 83, 84, 158, Vol. I of Exhibits); the Baltimore & Ohio named in Ex. 115 (Vol. I of Exhibits) more than 20 well-known industries, in Ex. 122 (Vol. I of Exhibits) eight industries in Ohio and western Pennsylvania, in Ex. 125 (Vol. I of Exhibits) 11 industries in Pennsylvania and West Virginia; the Detroit & Toledo Shore Line named three industries (Ex. 167, Vol. I of Exhibits); and the Michigan Central named 14 industries (Ex. 174, Vol. I of Exhibits).

h. As further illustrative of the situation, Ex. 150 (Vol. I of Exhibits, pp. 460–477) introduced by the Pennsylvania Railroad shows the situation on that road in respect of spotting service. Mr. Orcutt, counsel for the Pennsyvania, referring to that exhibit, said (Record of Testimony, Vol. 3, p. 2057):

"Mr. Director, I have distributed and have given to you a statement containing the industries located on the Pennsylvania Railroad, separated as between the common carriers, the industries performing their own service for an allowance, those performing the very service and receiving none, those where the railroad performs the service, and those where the industry performs part of the service and the railroad likewise a part. * * *"

i. The exhibit referred to lists 833 industries which have systems of tracks, and for which the railroad does the spotting. (For purpose of the compilation any industry having two or more tracks is an industry having a system of tracks, although industries having a single siding are not included (Vol. 3, p. 2062).) The exhibit lists 59 industries which perform their own spotting and are paid allowances by the railroad; it lists 125 industries which per-
890 form their own spotting without allowances from the railroad; and it lists 18 industries where the spotting is performed in part by the railroad and in part by the industry, the latter receiving no allowance (Vol. 3, p. 2058).

10. Following its main report, the Commission issued supplemental reports containing its discussion of the evidence, findings of fact, and conclusions with respect to particular plants or industries, and with each such supplemental report it issued its order directing the carrier or carriers which serve the plant to cease and desist from paying allowances to the industry for performing its own spotting service or from performing the service for the industry without charge in addition to the line-haul rates. The six specific orders involved in the cases at bar were issued respectively in connection with the following supplemental reports dealing with particular plants of the plaintiffs:

American Sheet and Tin Plate Company Terminal Allowance, 209 I. C. C. 719, July 5, 1935.

Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273, June 7, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467, June 25, 1935.

Weirton Steel Company Terminal Allowance, 209 I. C. C. 445, June 24, 1935.

West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213, July 29, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527, September 12, 1935.

At each of their respective plants the spotting service is performed, and an allowance or refund from the railroad is received therefor, by the respective plaintiffs, except at the Weirton,
891 W. Va., plant of Weirton Steel Company, at which plant the Pennsylvania Railroad performs the spotting service without charge in addition to the line-haul rates. The facts upon which the Commission reached its conclusions and based its specific order in each of the six cases are set forth in the respective supplemental report, and will be found and stated separately hereinafter, with respect to the particular plants of each plaintiff.

11. The conclusions reached by the Commission in all six supplemental reports are substantially the same, and those contained in the report in the Allegheny Steel Company case may be used as illustrative, as follows:

"Satisfactory spotting service at this industrial plant necessitates many switching movements daily between the interchange tracks and the points of loading and unloading. It is apparent that the switching service performed in spotting cars greatly exceeds ordinary team-track or simple switching delivery and is in excess of that which may be lawfully required of respondent under its line-haul rates. Terminal Allowance to St. Louis Coke & Iron Co., 85 I. C. C. 591, 600.

"We find that the existing line-haul rates of the Pennsylvania Railroad must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; that the transportation services which it is the duty of the carriers to perform for the steel company begin and end at the interchange tracks; and that the switching movements by the steel company between such interchange tracks and points within its plant are plant services which it is not the duty of the respondent carrier to perform under its line-haul rates.

"We further find that by the payment of an allowance for the service performed on interstate shipments beyond the interchange tracks described of record, the respondent carrier provides a means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act.

"An appropriate order will be entered."

892 12. The orders entered in the six cases are similar, and the following one is typical:

"Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The Pennsylvania Railroad Company to the Allegheny Steel Company for performance by the latter of spotting service within its industrial plant at Brackenridge, Pa., and the Commission having under date of May 14, 1935, made and filed a report, Propriety of Operating Practices—Terminal Services, 209, I. C. C. * * *, containing its legal conclusions with respect to the general situation presented and the division having on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the Allegheny Steel Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance The Pennsylvania Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

"It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 1, 1935, and thereafter to abstain from such unlawful practice."

893 13. American Sheet & Tin Plate Co. v. United States, Equity No. 3110

a. The bill of complaint in this case seeks to enjoin and annul the Commission's order of July 5, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying allowances in the amount of $1.10 per loaded car to the plaintiff for performance by it of "spotting service" within its industrial plants at Vandergrift, Pa., and Wellsville, Ohio, and that the Pennsylvania Railroad Company and the Baltimore & Ohio Railroad Company cease and desist from paying like allowances to plaintiff for performing such spotting service within its plant at Scottdale, Pa. At the hearings before the Commission plaintiff, with the consent of the Commission's counsel and examiner, selected the spotting service at its Vandergrift plant as typical of those performed at the three plants just mentioned (R. 10444-5). Pursuant to this agreement, the Commission's findings and order in this case relate to and include the three plants. The spotting service performed by plaintiff consists of moving loaded and empty cars to and from points called interchange tracks adjacent to plaintiff's plants, on which tracks the railroads have for many years delivered and received cars to and from plaintiff.

b. Plaintiff's plant and its physical arrangement, type and location of buildings, location and number of plant tracks and spotting points, and the location and arrangement of the interchange tracks, spur tracks, and main line of the railroads are shown in detail on a blueprint or map produced in evidence as Exhibit C–164 (Vol. 5 Ex-

hibits). Witness Cramer, in charge of plaintiff's Transportation Division, gave a detailed description of the physical facts just
894 mentioned (R. 10444–10462), and described the physical circumstances and conditions under which plaintiff performs the spotting service. Plaintiff's Vandergrift plant has been in operation more than thirty years, manufacturing steel by open hearth and rolling process. It and the Wellsville plant are served by the Pennsylvania exclusively, while the Scottdale plant is served by the Pennsylvania and the Baltimore & Ohio. The interchange track at which these carriers deliver and receive cars to and from plaintiff at the Vandergrift plant is located at the west end of the plant. Within the plant are 5 loading and 15 unloading points where freight cars are spotted (R. 10445), and there are 8 miles of plant track consisting of two main tracks with which 20 or 25 additional plant tracks connect (R. 10449). These tracks are all owned and operated by plaintiff. In performing the spotting service between the interchange tracks and these loading and unloading points, plaintiff moves the cars a maximum of 5,400 feet, a minimum of 800 feet, and an average of 2,500 feet (R. 10446). During the year 1930, taken as a typical year, plaintiff handled inbound, 5,783 cars, and outbound, 6,181 cars, in this spotting service.

c. Plaintiff owns 4 switching locomotives, 3 of which are in constant use over a 24-hour period in performing the spotting service and in intra-plant switching (R. 10457). The nature of the spotting service performed by plaintiff has not changed since 1915. Plaintiff has always performed this service and has never requested the railroad to perform it (R. 10448, 10450). Plaintiff received no allowance for the service between the time the plant started operating in 1902 and the time when the first allowance was made in 1917 (R. 10447).

d. Weighing of outbound traffic is required by plaintiff
895 for its industrial purposes, and the weights are used by the railroads for billing purposes. A considerable amount of inbound traffic, including scrap, pig iron, and limestone, is weighed by plaintiff "to see that the freight charge is being assessed on the correct weight, and we weigh the cars to see if we are actually getting what we are paying for." The weighing necessitates moving inbound cars from the interchange tracks to the scales, and, after weighing, then to the final point of placement. Weighing of outbound cars requires the same movement, but in reverse. The scales are located between the interchange tracks and the loading and unloading points (R. 10451–2). Thus, as stated by the Commission, the railroads could not perform the spotting service in one uninterrupted movement at its ordinary operating convenience.

e. Plant requirements, convenience and interference. The operation of plaintiff's plant requires continuous spotting service, and if the railroads undertook to perform the service, their locomotives would have to be assigned for continuous service (R. 10450). When the railroad delivers a string of cars on the interchange tracks, plaintiff

promptly spots the cars within the plant "if they are required immediately", but if they are not required immediately the cars are moved from the interchange tracks "in the regular course of our spotting and work" (R. 10450). Ordinarily, plaintiff moves cars delivered to it on the interchange tracks in as few trips as efficient operation permits, but when particular carloads of material are needed in the plant operation, it moves those cars into the plant leaving others on the interchange track (R. 10454). Plaintiff is willing to permit the railroad to perform the spotting service (R. 10448), but, if the railroad undertook to perform the service, it would be required to
896 place the cars after their arrival at Vandergrift as needed by plaintiff and, to do so would require engines in the plant at all times for that purpose, which plaintiff's witness said "could be arranged to conform to our needs" (R. 10451). He stated that he did not think there would be any interference between the railroad and the plant operations if the railroad undertook to perform the spotting service but that "it would be a matter of cooperation between the industry and the railroad" (R. 10451). At plaintiff's plants located at Farrell, New Castle and Monessen the railroads themselves perform the spotting service (R. 10473), only upon orders of the plaintiff: Plaintiff's witness testified "The railroads wouldn't place any which we didn't ask them to place"; that the railroads hold the cars on their own tracks until ordered by plaintiff to bring them into the plant, and "We order down what we require and what we need * * * upon arrival of freight anywhere, we furnish the orders to place the cars."

f. At the Shenango works of the plaintiff's New Castle plant, the railroads perform spotting service for plaintiff "just as the industry wants whatever we have for them" (R. 10483-4). The services are performed on "a switching order" from the industry.

g. Locomotives which the Pennsylvania Railroad maintains and operates at Vandergrift and in that vicinity would not negotiate all the curves in the Vandergrift plant of the plaintiff. After the railroad has delivered cars on the interchange track the cars are taken into the mill by plaintiff's engines as needed, and in a great many instances, cars are left on interchange tracks until required by plaintiff in its plant. There are "always cars at interchange tracks, either empties or loads" (R. 10466).

897 h. The railroads have never performed the spotting service for plaintiff at its Vandergrift plant although the plant has been in operation for more than thirty years (since 1902), and it was not until 1917 that the railroad paid plaintiff an allowance for performing the service (R. 10445, 10447). Payment of the allowance was not because of any change in either the line-haul rates, so far as the record shows, nor because of any change in the nature of the service performed.

14. Allegheny Steel Co. v. United States, Equity No. 3111

a. The petition in this case seeks to enjoin and annul the Commission's order of June 7, 1935, requiring the Pennsylvania Railroad to cease and desist from paying an allowance of $1.07 per loaded car for switching or "spotting" cars within its plant at Brackenridge, Pa. Plaintiff manufactures steel and alloy products and various kinds of railroad supplies.

b. For many years the Pennsylvania has delivered to and received from plaintiff loaded and empty cars at a point agreed upon, called "interchange tracks" adjacent to plaintiff's plant. Those tracks are reached by spur tracks connecting with the Pennsylvania's main line. The spotting for which plaintiff receives the allowance consists of the movement of cars between these interchange tracks and particular points or "spots" within the plant where plaintiff requires the cars to be placed for loading or unloading. The cars are moved from and to the interchange tracks throughout each 24-hour period as and when plaintiff's manufacturing processes require the contents of the inbound loaded cars, and the movement of finished products to make room for the continuous outturn of the plant.

c. Plaintiff's plant and its physical arrangement, location and type of buildings, location and number of plant tracks, and the
898 location and arrangement of the interchange tracks, the spur tracks and main line of the railroad, are all shown in detail in Ex. C–147 (Vol. No. 5 Exhibits). Witnesses Carr, Taylor, and Mimm submitted in evidence (R. 10147 and 10159, 10150, 10152, respectively) a description of the physical facts just mentioned. Their testimony shows, as found in the Commission's report, that the plant covers approximately 100 acres of ground, of which 75 acres are occupied by the plant buildings and structures. Within the plant there are 150 industrial tracks and sidings totaling 10 miles in length. The cars are spotted at 11 important loading and unloading points, and at 3 scrap yards, and at 5 or more locations at which the cars are loaded and unloaded by aid of locomotive cranes. This large industrial plant has a great number of separate buildings and manufacturing units, Ex. C–147, and a complex and intricate net-work of plant tracks used in carrying raw materials from one to another unit of the plant in the manufacturing process. It is bounded on the north by the main line of the Pennsylvania and on the south by the Allegheny River, facilities for both rail and water transportation being available. About 80 inbound cars are handled at this plant daily, but the record does not show the number of outbound cars. As long ago as 1919 plaintiff handled annually within this plant as many as 25,000 cars, containing raw materials inbound and finished products and waste material outbound. All of the plant tracks from the interchange tracks into and throughout the plant are owned by plaintiff (R. 10149).

d. Plaintiff owns and operates within the plant 7 switching locomotives, of which 5 are normally in active use (R. 10153). During

one-third of the average 24-hour period these locomotives are engaged in moving cars to and from the interchange tracks. During
899 the other 16 hours they are used in intra-plant switching, that is, moving cars from one manufacturing unit to another within the plant (R. 10154). The spotting service, however, is not done in 8 consecutive hours but is performed throughout the 24-hour period "according as the industry requires it" (R. 10163).

e. After the cars are switched by the Pennsylvania from its main line over spur tracks to and delivered upon the interchange tracks, they remain there until such time during the 24-hour period as plaintiff requires the contents of the cars at particular departments or manufacturing units within its plant. Plaintiff's locomotives move the cars into the plant and place them at such points and at such times as are necessary for its manufacturing processes (R. 10157–8). The movement of outbound cars from points within the plant to the interchange track takes place under the same conditions, but in the reverse.

f. Weighing of all inbound carload shipments is required by plaintiff and the movement from the interchange track to the unloading point is interrupted for this purpose. The cars "are first moved from the interchange track to the scale, and weighed and shoved into the locations for loading and unloading" (R. 10158). Those weights are taken for industrial purposes, and not at the request of the Pennsylvania, but the latter uses them for shipping weights (R. 10165). Plaintiff also requires weighing of its outbound traffic both light and gross, and the Pennsylvania also uses those weights for billing purposes (R. 10158). From this testimony the Commission properly concluded that if the railroad undertook to perform the spotting service, the plaintiff's requirement that all cars be weighed for industrial purposes would necessarily prevent the
900 railroad from moving the cars in one "uninterrupted movement at its ordinary operating convenience" between the interchange tracks and the loading and unloading points.

g. Plant requirements, convenience, and interference. Cars are moved to and from interchange tracks "as the different plant units require them" (R. 10158), and upon orders from the particular department of the plant that requires either a loaded car or an empty car. The evidence shows that the convenience of plaintiff in its manufacturing processes and not the convenience of the railroad must be served in performing the spotting service. Witness Carr (R. 10161–2) said that plaintiff would be willing to permit the railroad to perform the spotting service "if they do it as expeditiously and as efficiently as we do it ourselves"; that "I would certainly want it spotted when we wanted it and as we wanted it spotted", and that "the convenience of the trunk line from my standpoint is not the convenience of the consignee or the shipper. What might suit the railroad's convenience might entirely delay the operation of our plant and also delay the production of finished material for shipment over the railroad * * * (R. 10161). His testimony conclusively

shows that if the railroad undertook to do the spotting service it would have to do so entirely under plaintiff's "jurisdiction." He said (R. 10162) it would be satisfactory to plaintiff for the railroad to perform the service if it assigned its own locomotives to the plant and if "the movement of these locomotives and their work for the entire time that they are there is subject to the plants' orders."

h. Locomotives of the Pennsylvania "located in that particular district could not do the spotting required by the Allegheny
901 Steel Company at the various locations throughout the plant on account of the size of the engines. They are too large; wouldn't take the curvature" (R. 10163). If the Pennsylvania undertook to perform the service "it would require the bringing in at that district power that would be suitable to perform the service on those tracks, and which would have to work under the jurisdiction of the yardmaster of the Allegheny Steel Company, under his orders, of course, because we wouldn't know what requirements he would have" (R. 10163); and even if plaintiff undertook to straighten out the curves in its tracks so that the railroad could operate its locomotives over them "it is just entirely possible that they could not, on account of the plant layout. It might involve a whole lot of changes in their plant." If the railroad brought in smaller locomotives that could negotiate plaintiff's plant tracks "there would be no further use for them than to be usel at that particular plant", and when not in actual use within the plant they would have "to stand by and do nothing" (R. 10165–6).

i. For twenty-nine years (R. 10160) before obtaining an allowance, plaintiff performed the spotting service at its own expense, and one of the reasons it asked for an allowance was that other iron and steel industries were being paid for similar services. During the entire existence of the plant to the present day the custom of the railroad at this plant has been, and now is, to deliver loaded cars and receive empty cars on the interchange tracks which have been designated and agreed upon by the railroad and plaintiff for that purpose.

902 15. Pittsburgh Plate Glass Co. v. United States, Equity No. 3112

a. The petition in this case seeks to annul and enjoin the Commission's order of June 25, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying an allowance of 65¢ per loaded car to plaintiff for performing plant spotting of cars within its plant at Ford City, Pa., where plaintiff is engaged in the manufacture of plate glass. In 1929, plaintiff handled 6,017 cars at this plant, in 1930 it handled 4,043 cars, and in 1931 it handled 3,396 cars. About one-third of these cars were outbound and the balance contained inbound raw materials.

b. Plant arrangement, equipment, and power. Exhibit C–160 (Vol. 5, Exhibits, p. 181) is a map or blueprint which shows in detail the arrangement and location of buildings, plant tracks, spur tracks, and

their connection with the main line. This exhibit was explained by witness Putnam, superintendent of the plant (R. 10407–8), who also pointed out the spots or locations at which cars are placed for unloading and loading. The plant contains 8 or 9 miles of industrial track connecting with various buildings and units of the plant. Plaintiff has two locomotives operating in the plant, one of which is now in use about three hours each day (R. 10404). These locomotives operate over all of the plant tracks in performing both the spotting service and intra-plant service between the different units. One of the plant tracks over which spotting service is performed has a curvature of 25 degrees, but other tracks used in this service can be negotiated by switching locomotives of the railroad (R. 10408). There are numerous "spots" at which plaintiff requires cars to be placed for unloading, there being one or two for each of the
903 operating units in the plant, and some 15 such points being detailed by witnesses (R. 10407). Four "spots" for loading outbound cars were shown (R. 10407–8).

c. Weighing. All inbound freight is weighed for plaintiff's industrial purposes. On outbound freight "the package weights are taken." Plaintiff's scales are located on the east side of the plant (R. 10408–9).

d. Plant requirements, convenience and interference. Plaintiff requires performance of interchange spotting 5 or 6 hours each day, and one locomotive could perform the service "if he was there at the proper hours", which would be designated by the industry. The spotting is required from 10 a. m. to 4 p. m. each day, and during that time plaintiff's locomotives are also performing intra-plant switching (R. 10411).

e. The Pennsylvania has no locomotive in that district which could negotiate plaintiff's industrial tracks and, to perform the service, it would have to bring in from elsewhere and assign a locomotive to that plant exclusively, to cover the "spread period" of 5 or 6 hours during which plaintiff requires spotting (R. 10413).

f. The result of an attempt by the Pennsylvania to perform the service at this plant is shown in a previous decision of the Commission and in the testimony (R. 10415). The complaint, filed with the Commission in 1919, alleged that the Pennsylvania's refusal to perform the service or to pay plaintiff its cost of performing the service was unreasonable, unjustly discriminatory, and unduly prejudicial, and prayed for an order requiring the Pennsylvania to pay plaintiff a reasonable allowance. The Commission's report, Pittsburgh Plate Glass Co. v. Director General, 58 I. C. C. 81, states, at p. 82:

"Prior to about 1903 the defendant carrier did the switching and spotting, together with a large proportion of the intermill work, without extra charge, but the service became unsatisfactory and
904 was a hindrance to the plant, and the complainant took it over with its own motive power. In December 1906 complainant's

representative made application verbally to the defendant carrier for an allowance to cover the cost of the service performed at the Ford City plant, which has been followed up in conferences from time to time, thus far without success. On the other hand, complainant has never asked the carrier to perform the service, but is willing that it should if performed efficiently and satisfactorily, not merely at the carrier's convenience, and it is urged that the service could not be efficiently performed by the carrier unless an engine was devoted exclusively to such service."

The Commission did not find that it was the Pennsylvania's legal duty to perform the service or to pay an allowance, but found upon the facts of record that the Pennsylvania's failure to do so was not shown to be unreasonable. It said (p. 84):

"In determining the reasonableness of the practice of the carrier the real issue is whether the service performed by complainant is one which ought to be done by the carrier as a substitute for delivery on its own tracks or one reasonably contemplated at the line-haul rate. In this case no increased charges have been imposed upon the complainant by reason of a cancellation of former allowances or a discontinuance of a switching and spotting service by the trunk lines since January 1, 1910, nor has that line ever been called upon to perform the service in lieu of an allowance."

The Commission found that the Pennsylvania's refusal to perform the service or to pay an allowance, while performing similar service or paying allowances therefor to plaintiff's competitors, resulted in undue prejudice to plaintiff, and issued an order giving the Pennsylvania the alternative of performing or paying plaintiff for the service, or of ceasing the performance of or payment of allowances to plaintiff's competitors.

g. The 65¢ allowance to plaintiff, which was fixed and published in 1927 after the Commission's decision, was a "purely arbitrary" figure and represented one-third of the estimated cost to the railroad of performing the service (R. 10414). After the Commission's decision, the Pennsylvania undertook, on August 2, 1927, to
905 perform the spotting service but quit on September 11, 1927, because the service was so unsatisfactory. Plaintiff's work inside the plant, and the Pennsylvania's engine in there at the same time, caused an unsatisfactory arrangement.

h. The evidence clearly shows that the spotting service must be performed at plaintiff's convenience and direction and not at the convenience of the railroad. The failure of the Pennsylvania's attempt to perform the service in 1927 was due to the impossibility of making any arrangement which would meet plaintiff's industrial needs and, at the same time, serve the Pennsylvania's convenience. The evidence further shows that inbound cars cannot be spotted in an uninterrupted movement for the reason that plaintiff requires that all such cars be first taken from the interchange tracks to the scales to be weighed for its industrial purposes. And the evidence further establishes that the Pennsylvania's locomotives which oper-

ate in that district cannot negotiate plaintiff's industrial plant tracks, and that to perform the service itself the Pennsylvania would be compelled to obtain a suitable locomotive and assign it exclusively to performance of plaintiff's service.

i. This record does not show when the plant began operations but the Commission's report, just mentioned, shows that it was operating before 1903. It states (p. 82) that prior to 1903 the Pennsylvania performed the switching, "but the service became unsatisfactory and was a hindrance to the plant, and the complainant took it over with its own motive power." There has been no uniformity or custom in the performance of or payment for the service at this plant. The Pennsylvania performed the service prior to 1903, but from that year to 1927 plaintiff performed it and received no allowance. The record shows no change in the line-haul rates when the Pennsylvania ceased performing the service in 1903 or when it began paying the allowance in 1927.

906 16. Weirton Steel Co. v. United States, Equity No. 3113

a. In this case plaintiff seeks to enjoin and annul the Commission's order of June 24, 1935, which requires the Pennsylvania Railroad Company to cease and desist from performing spotting service for plaintiff at its plant at Weirton, W. Va., or paying an allowance therefor. At this plant the Pennsylvania itself performs the spotting service instead of paying an allowance, though in 1929 it published an allowance of $1.23, but plaintiff has declined to perform the service (R. 10221). During a period of plant construction between 1919 and 1921, plaintiff performed the service at several of the separate units of the plant (R. 10220).

b. Plant arrangement, equipment, and power. The first unit of the plant was constructed in 1909. Exhibits C–153 and C–154 (Vol. 5 Exhibits, pp. 174, 175), show the growth of the plant unit by unit, the locations of the seven major units or departments of the plant, the location and arrangement of the Pennsylvania's main line, the interchange tracks, and plaintiff's industrial tracks within the plant. The Pennsylvania owns 14 miles of track which extends through the middle of the plant, and plaintiff owns 25 miles of industrial tracks which extend from the Pennsylvania's tracks to the several separate units or departments of the plant (R. 10223), each of which has its separate industrial track layout (Ex. C–154, R–10223).

c. There are some 20 distinct points within the plant at which cars are loaded and unloaded (R. 10224–6). The longest switch movement necessary in spotting the cars is 5,200 feet, the shortest 400 feet, and the average 2,300 feet, and from 4 to 5 miles of plaintiff's private track is used by the Pennsylvania in performing the spotting service (R. 10226–7).

907 d. Plaintiff maintains 9 locomotives within the plant, 5 of which are large switching locomotives and 4 are small wheel engines, the former being used in intra-plant switching and the latter in handling materials between different buildings and units of the

plant (R. 10227–8). The Pennsylvania operates 3 locomotives in the plant: One is used 24 hours per day in interchange switching and spotting at the Steel Works, another is used 16 hours per day for spotting at the strip mills, and still another serves several units of plaintiff's plants a total of 7 or 8 hours but at different units and hours during the 24-hour day. This locomotive also serves plants of other nearby industries when not engaged at plaintiff's plant (R. 10228).

e. The Pennsylvania performs all spotting of cars in this plant. Cars destined to the Steel Works are switched by the Pennsylvania from its railroad yard and delivered upon two storage or interchange tracks where that switch movement ends. Plaintiff's locomotives later move the cars from the interchange tracks to its scales, weigh them in order to obtain the weight of inbound freight, and move them back and place them upon the interchange tracks. Then when the contents of the cars are required at the Steel Works, the Pennsylvania's locomotive moves the cars from the interchange tracks and spots them at the particular points in the Steel Works at which plaintiff desires to unload them (R. 10230–1, 10242–3). Thus there are two separate and distinct switch movements by the Pennsylvania of cars spotted at the Steel Works; and between the time of those separate movements, plaintiff itself handles the cars from the interchange tracks to the scales for the purpose of industrial weighing. This interruption by plaintiff of the Pennsylvania's spotting service is to enable plaintiff "to dispense with the charge that would be made if the railroad" did the weighing (R. 10230). Cars destined to or from other units or departments of the plant than the
908 Steel Works are not held upon interchange tracks but are spotted by the engine of the Pennsylvania which brings them into the plant (R. 10232–3); but the Pennsylvania brings in from its yard only such cars as are called for by plaintiff (R. 10233–4).

f. Weighing. Plaintiff requires that all inbound freight be weighed except iron ore, coal or limestone, which, however, are sometimes weighed to ascertain whether there has been a loss in transit (R. 10229). All outbound cars containing finished products, except the plant and structural mill products, are weighed, the weighing in both instances being done on plaintiff's scales (R. 10230–1). The weighing of inbound cars to the Steel Works is done by plaintiff to avoid paying the railroad the weighing fee. This is accomplished by plaintiff's handling of the cars between the scales and interchange tracks, thus necessitating interruption of movement of the cars between the Pennsylvania yards and the "spots" in the plant, and resulting in two separate movements, now performed by different engines in switching the cars from the railroad yard to the final "spots" at the Steel Works. The Pennsylvania weighs the cars which it spots at units other than the Steel Works and receives the tariff fee for such weighing (R. 10229, 10231).

g. Plant requirements, convenience and interference. The Pennsylvania spots the cars according to a "schedule" arranged by plain-

tiff to meet the requirements of the various departments of the plant. Its conductor is given a "pull slip" or written order by plaintiff directing the placement of the cars at the spots required by plaintiff (R. 10233). At the Steel Works where the Pennsylvania maintains a locomotive "24 hours a day, 7 days a week", the operation is under the direction of plaintiff's yardmaster or foreman, who
909 gives the engine foreman "a written work order telling him what cars must be moved to a certain department * * * and what time, of course." The Pennsylvania performs for plaintiff what is called a "stand-by service" (R. 10234). It would not be possible for the Pennsylvania engine to spot cars at the Steel Works upon any schedule convenient to it and without regard to plaintiff's requirements (R. 10235) "because these plants, or departments rather of the Steel Works, operate continuously for 24 hours a day, 7 days a week, and if they are subject to some interruptions in their operating program—both the blast furnaces, open hearth furnaces and blooming mill—they start off in the beginning of the week's operation with a definite schedule in view—one of them will get an hour or two ahead and another will get an hour or two behind after several days have gone by, making these movements to the different departments come at different hours in the 24-hour period, and would not be feasible to have someone coming in there with clock-like regularity for it won't fit the Pennsylvania's performance."

h. All the spotting service performed at this plant is performed by the Pennsylvania under the direction of the plaintiff, and occasionally there may be some interference of the Pennsylvania's locomotives by the operation of plaintiff's plant locomotives (R. 10240–2). It would be impossible for the Pennsylvania to perform the service "by going in any time it was especially convenient to them to arrive there and spot the cars without having some arrangement made with the industry", and the program for spotting the cars is "nothing more than an attempt to synchronize the two services within the plant."

910 i. For the first ten years the railroad performed the spotting service at this plant, but from 1919 to 1921 it did not perform the service at several of the departments of the plant nor did it pay an allowance for plaintiff's performance of the service. Since the latter date, the railroad has performed all the service, and plaintiff has declined to perform the service for an allowance of $1.23 per car.

911 17. West Leechburg Steel Co. v. United States, Equity No. 3130

a. Plaintiff seeks in this case to enjoin and annul the order of the Commission issued July 29, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying an allowance of $1.28 per loaded car for spotting cars within its plant at Leechburg, Pa., where plaintiff is engaged in the manufacture o hot and cold rolled strip and skelp steel. In 1929, operating at 67% of plant

capacity, plaintiff handled 11,000 cars into and out of the plant in spotting service.

b. Plant arrangement, equipment, and power. Exhibit C–156 (Vol. 5 Exhibits, p. 177) is a map or blueprint showing in detail the plant arrangement, number and location of buildings, industrial tracks, interchange tracks, and the main line of the railroad. Plaintiff's plant contains 17 industrial tracks aggregating about 4½ miles in length which serve eight important points where cars are spotted for loading and unloading. The plant is bounded on the north by the Pennsylvania tracks and on the south by the Kiskiminetas River, and is served by two interchange tracks, one for outbound and one for inbound cars. At these tracks the Pennsylvania delivers and receives cars in two shifts inbound and two shifts outbound each day, at the present time, while plaintiff is operating its plant on an 8-hour shift (Ex. C–156, R. 10249). Plaintiff maintains one switching locomotive which it uses in spotting and other service continuously while the plant is operating. It also operates one locomotive crane which engages in intra-plant work only (R. 10248–9).

c. Spotting service. After the Pennsylvania has switched inbound cars from its main line and delivered them on the inbound
912 interchange tracks, plaintiff's locomotives move them to the spots within the plants in the following manner (R. 10250):

"Cars are moved west on the inbound interchange track to a point near the 16 inch hot mill, which I have designated in red pencil 'scale,' farther on down to the spur just east of the P. R. R. westbound to Kiski Junction, and then back in under the various unloading joints on the 16 inch hot mill marked 'Craneway,' 'Shipping Craneway,' '12" hot mill Craneway,' and the track leading back to building marked '9" H. M.' which is 9 inch hot mill."

The service performed in spotting outbound cars on the outbound interchange track where they are picked up by the Pennsylvania, is as follows (R. 10250):

"Cars are taken from four out-bound loading platforms, the largest platform being located between cold mill and warehouse, about the center of the print; second platform at the warehouse; third platform at the 16 inch hot mill, and the fourth platform at the 12 inch hot mill."

d. Weighing. Plaintiff weighs all inbound cars "for our own purposes only," but outbound cars are not weighed. The time consumed in weighing the cars is excluded from the estimated amount of expense incurred by plaintiff in the spotting service which is covered by the allowance paid it by the railroad.

e. History of the allowance. The record does not show just when this plant first began operations, but it always performed its own spotting service and received no allowance until 1927. The circumstances leading to the publication and payment of the allowance are as follows (R. 10247):

"Under date of March 25, 1925, the West Leechburg Steel Company of Leechburg, Pennsylvania, filed application with the Pennsylvania Railroad Company through their Freight Traffic Department for plant switching allowance, requesting that the Pennsylvania Railroad Company made allowance in the lawful amount for the service performed by the West Leechburg Steel Company, or else that the Pennsylvania Railroad itself perform the service by its own power, the same as for this company's competitors, such as
Sharon Steel Hoop Company and Carnegie Steel Company
913 at Sharon, Pennsylvania, the Bourne Fuller Company at
Cleveland, Ohio, and the Wheeling Steel and Iron Company at Martins Ferry, Ohio, secured by operation of their own power. This application was considered by the Pennsylvania Railroad Company, and under date of May 8, 1925, the West Leechburg Steel Company was notified that the Pennsylvania Railroad Company would not grant switching allowance but preferred to do the switching themselves, and the West Leechburg Steel Company agreed to this on the basis of this aforementioned.

"Pennsylvania Railroad examination of the tracks at the plant of the West Leechburg Steel Company disclosed the fact that there existed some curvatures and turn-outs over which their power could not operate. The West Leechburg Steel Company accordingly requested the Pennsylvania Railroad to stake out the tracks, agreeing to re-adjust their tracks and turnouts. Work was started in March 1926 and finally approved by the Pennsylvania Railroad during February 1927 and effective March 7, 1927, the Pennsylvania Railroad commenced switching by furnishing two shifts a day, one in the morning and one in the afternoon. On May 22, 1927, the Pennsylvania Railroad, after careful study, decided as a matter of economy that they would prefer to withdraw their power and pay the West Leechburg Steel Company an allowance for performing the plant switching; accordingly, on June 22, 1927, the usual cost study was commenced by the railroad committee appointed, in conjunction with the West Leechburg Steel Company, which resulted in the allowance now being paid as published in Pennsylvania Railroad Company's tariffs GO ICC No. 14755 and AA ICC 2135, originally effective November 25, 1927."

f. Plaintiff was dissatisfied with the spotting service performed by the Pennsylvania because (R. 10251–2) the Pennsylvania sent a locomotive into the plant only for an hour or two during the morning and again in the afternoon, which was insufficient to "take care of all work;" and (R. 10253):

"there was cars that the Pennsylvania Railroad were not there to place for us. I will cite an example: While we have these two shifts a day, there are cars placed at different times a day by through trains; for instance, the cars that we receive from the Bethlehem Steel Company at Johnstown are usually placed at our plant by a Pennsylvania train somewhere around three or four o'clock in the afternoon, and quite often we could not wait until the following morning for

the railroad to spot those cars for unloading, and it was necessary for us to get the cars, weigh them, and get them into the mill and unload them."

914 g. Plant requirements, convenience, and interruption.—Plaintiff receives materials used in its manufacturing processes which it must have spotted at various units of its plant for immediate use, thus necessitating "on call" interchange or spotting service 24 hours a day or whenever the plant is in operation. Continuous spotting service is required solely to meet the needs of plaintiff's industrial operations and manufacturing processes, and service satisfactory to plaintiff could not be performed by the Pennsylvania at its own convenience or upon any "set" schedule. The evidence with respect to weighing shows that the spotting service is not and could not be performed in connection with inbound cars in one uninterrupted movement because plaintiff requires that all inbound cars be moved from the interchange tracks to its scales for weighing and then spotted at unloading points.

h. The Pennsylvania withdrew its power and arranged to pay the industry itself for performing the spotting service (R. 10255–7) for the following reasons:

"The switching service was performed by what is known as our local crews, arriving there at a certain time agreed upon by the mill people and us, and when they were at the plant, of course, they reported to the man at the plant in charge of the switching and performed all the service that was required at that time, and when that was done they would leave; another crew would come in and do the same thing, but the West Leechburg Plant is located at an outlying point and cars arrive at that plant in through service on power which was not suitable to place at any point in the mill—that is, our heavy power. Those were through trains with large power that change track or tracks there for that purpose, and of course the West Leechburg people would be in need of that particular car or lading that was in the car, and we would have no power there to place it. The West Leechburg operation is a 24 hour operation and their needs cover a period of 24 hours, and of course we put crews in there at certain times during the day which would not meet up with their requirements; therefore, it was decided to go back to the old shifting power."

915 * * * "we had considerable complaint from the concern that the shifting service was not satisfactory—part it didn't cover. We were not there when they needed it, in other words. As I stated, that covered a period of 24 hours, and our engine was only in there during certain periods of the day; therefore, we couldn't perform service when they needed it. At a mill there is always times coming up, or cases coming up, where they will want a shift made. You don't have your power and they cannot afford to wait two or three hours, and sometimes we would have to send a shifter up from Kiski Junction to perform the service. That was not satisfactory to us and it was not satisfactory to them."

i. The Commission properly concluded that the spotting service "has to be performed at the convenience of the industry", and that plaintiff's requirement for weighing inbound cars prevents them from being spotted in "an uninterrupted movement."

j. Excepting the three months during which the Pennsylvania attempted to perform the service, the interchange tracks have always been the point agreed upon between the railroad and plaintiff for delivery and receipt of cars. From this, and the further fact that the cars could not be moved beyond the interchange tracks and spotted at the various units of the plant except when and as directed and required by plaintiff to meet its manufacturing processes, placement of the cars upon the interchange tracks constituted the delivery to plaintiff "at reasonably convenient and accessible places" for loading and unloading.

916 18. Pittsburgh Plate Glass Co. v. United States, Equity No. 3136

a. Plaintiff seeks in this case to enjoin and annul the Commission's order of September 12, 1935, which requires the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company to cease and desist from paying allowances of 75¢ and 65¢, respectively, per loaded and empty car, to plaintiff for performing plant spotting of cars in its plant at Crystal City, Mo., where plaintiff is engaged in the manufacture of plate glass.

b. Plant arrangement, equipment and power. The arrangement of this plant, location of buildings, plant tracks, spur tracks and their connections with the Missouri Pacific and the Frisco, are shown in 4 charts or maps introduced by witnesses for the plaintiff and for the railroads (Exs. A–151, 152, 154, 155; Vol. 3 Exhibits, pp. 394–401). A complete detailed description of the plant and the circumstances under which the spotting service is performed are set forth in the testimony of witnesses McMillen (R. 6364–6376) and Brown (R. 6377–6382). The facts so stated by those witnesses are accurately and succintly summarized in the Commission's report, and we quote and adopt the Commission's statement of those facts:

* * * "The plant contains numerous buildings and about 27 railroad standard-gage tracks approximately 4 miles in length, which reach the numerous points of unloading and loading within the plant. The plant is served by the Missouri-Illinois Railroad Company, a subsidiary of the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company hereinafter generally termed the Missouri Pacific and the Frisco respectively.

"The main line of the Frisco from St. Louis, Mo. to Springfield, Mo., parallels the plant on the northeast side of the plant property and passes through a yard containing about 10 tracks located
917 at the Crystal City station. One of the plant lead tracks parallels the Frisco main line and connects therewith at a point about 1,300 feet north of the Crystal City station. Another connection is made with the yard tracks about 500 or 600 feet north-

east of the station with what is known as the Crystal City Railroad. This connection is seldom used, but to reach the plant through this connection it is necessary to cross the Frisco main line. Cars are delivered to the plant by the Frisco on any available track in the Crystal City yard. Outbound cars are placed on tracks in this yard designated by the agent at Crystal City. Cars consigned to the plant for the north are moved directly by the lead connection with the main line of the Frisco to Crystal City yard. The plant engines then move the cars in the reverse direction over the Frisco main track to point of connection with the plant lead track, thence over the lead track into the plant. The track layout in the plant is complicated and contains many sharp curves. The tracks encircle the plant and there are many spur tracks leading to the different loading or unloading points, at least one of which is elevated."

c. Weighing. With respect to the weighing of the cars received at and shipped from the plant:

* * * "All cars, both loaded and empty, are weighed on a scale within the plant property. All cars, except those to be loaded or unloaded on the track on which the scale is located, after being weighed require a back-up movement to the point of switch with other tracks for placement for loading or unloading. Likewise there is required a movement of the cars beyond the switch point leading to particular spurs, and a back-up movement from the switch point to the points of loading or unloading on such spur tracks."

The weighing is done "for the plant" although it might also serve the convenience of the railroads (R. 6390–1).

d. The spotting service. The Commission's report correctly states the facts disclosing the conditions under which the service is performed:

* * * "The Frisco has never actually placed cars within the plant but, as far back as 1908, it entered into an agreement with the glass company under which cars are to be delivered to or received from the glass company on the tracks in Crystal City yard, above referred to. This agreement gave the glass company the right
918 to operate its engine over the main line of the Frisco between the Crystal City yard and the point of connection with the plant tracks. Local trains of the Frisco operating through Crystal City usually arrive at that point late at night, and it would not be possible for the local to perform the necessary switching in the plant upon arrival, for the reason that the heavy locomotives could not operate over all the plant tracks in performing the necessary spotting service, because of curvature. Such spotting service could only be performed by the assignment of a switching locomotive at Crystal City. The switching engine could not be employed elsewhere in that vicinity, which means that it would be necessary to pay for an 8-hour trick to perform the service at the plant. At the time of the hearing it was stated it would take approximately two hours to perform such service, but in normal times the amount of traffic to be handled would be between 20 and 30 cars, and it was

testified it would then take approximately five hours due to the complications within the plant because it is necessary to operate solely between and into buildings and to protect the many employees working there."

e. The Commission correctly summarized and stated the facts of record concerning the allowance paid to plaintiff by the Missouri Pacific as follows:

"The Pittsburgh Plate Glass Company many years ago acquired the Crystal City Plate Glass Company, which prior thereto had built what is known as the Crystal City Railroad. A branch of this railroad extends from the Mississippi River to the plant of the glass company. It was constructed to bring to the glass company coal arriving via barge. In 1923 the Mississippi River & Bonne Terre Railroad made connections with the Crystal City Railroad and received from and delivered traffic to the industry at a point on the Crystal City Railroad about 1,000 feet from the point of connection. For the movement of cars between this point and the points of loading and unloading within the plant the glass company received an allowance of $2 per loaded car, which for competitive reasons was participated in by the Missouri Pacific. On January 1, 1929, the Mississippi River & Bonne Terre was leased by the Missouri-Illinois Railroad and about the same time the Missouri Pacific acquired control of the latter. On May 1, 1932, shortly before the hearing, the point of interchange with the plant was changed to two open tracks of the Crystal City Railroad located 6,000 feet nearer the plant. The amount of the allowance was also changed at that time to 75 cents per car both loaded and empty. For the privilege of operating over the Crystal City Railroad to
the present points of interchange the Missouri-Illinois main-
919 tains the tracks in a safe condition for the operation of its
locomotives and furnishes the nonsalvageable material. The glass company furnishes the salvageable material. As in the case of the Frisco the engines operating the local trains of the Missouri-Illinois could not operate over the plant tracks because of excessive curvatures. Furthermore, if that carrier undertook to perform the switching it would be necessary to pass the point of connection with the Frisco northeast of the plant and cross the main line of that carrier in reaching the plant."

f. History of allowances. The allowance paid by the Frisco was initiated in 1908 (Ex. A–153), and it has always been 65¢ (R. 6376).

The allowance of 75¢ now paid by the Missouri Pacific was first made by the Mississippi River & Bonne Terre Railroad (now owned by the Missouri-Illinois Railroad, a subsidiary of the Missouri Pacific), and the original allowance was $2 for each round trip of a car into and out of the plant (R. 6408). The decision of the Missouri Pacific to pay the allowance was due entirely to the competitive arrangement, and the railroad paid the allowance merely as a traffic inducement (R. 6408). The allowance also "was a traffic competitive proposition" with plaintiff (R. 6411). The amount of this allowance was later reduced to 75¢ per loaded and empty car.

g. Plant requirements, convenience and interference. There are apparently some ten "spots" at which cars are placed for unloading within the plant, and some of these are on elevated tracks (Ex. A–154, R. 6380). Cars are spotted within the plant for loading and unloading upon the industrial tracks "as the industry wants them" (R. 6382). It would take the Frisco Railroad five hours to spot 20 cars within the plant because of the "physical layout." A switching engine would have to go very slow around the buildings and avoid many men working in the plant (R. 6374). Spotting within
920 this plant "would be much more complicated, there would be a great deal more of it than any team track that we have that I am familiar with" (R. 6374). The plant arrangement and tracks are such that both of the railroads could not spot cars within the plant at one time (R. 6373). The Frisco had no switch engine at Crystal City which could perform the service, and if it undertook to perform it, it would be necessary to bring in an engine from elsewhere and assign it exclusively to that plant (R. 6375, 6374). For the Missouri Pacific to reach the plant it must cross the Frisco tracks, but the switch movement could be made if the Frisco would consent to the crossing (R. 6400).

h. The Frisco has paid the allowance since 1908, and has never performed the spotting service. The contract (Ex. A–153) in which the allowance is provided, states no consideration for the allowance or any recognition by the Frisco of a legal duty to perform or pay for the service.

The Missouri Pacific neither performed the service nor paid any allowance for it until it saw fit to offer the allowance "merely as a traffic inducement" (R. 6408). Thus, during a period of 15 years, one of the two carriers serving plaintiff's plant paid an allowance, while the other carrier neither performed the service nor paid an allowance.

i. Plaintiff's requirements for weighing prevent any possibility of the railroads performing the service in an uninterrupted movement, for the movement of each car must be interrupted at the scales for industrial weighing. Plaintiff's manufacturing requirements will not permit the spotting service to be done at the railroad's convenience but will permit cars to be spotted only "as the industry wants them." If both railroads undertook to spot the cars hauled by them to the interchange tracks, their engines would interfere with each other unless one railroad stood aside and waited until the other completed the spotting of its cars.

921 19. The Commission correctly found in each case that the transportation included in the published rates begins and ends on the interchange tracks, and that the "spotting" service between those tracks and points within the plants is plant service and not "transportation"; and that by performing the "spotting" service for the Weirton Steel Company or by paying allowances to that Company and to the other plaintiffs the railroads provide the means by which plaintiffs enjoy a preferential service and refund or remit a portion of the published rates.

Conclusions of law

Upon the facts hereinabove found the Court reaches the following conclusions of law with respect to each of the six cases:

1. The Commission's orders are within its statutory authority.
2. The findings made by the Commission are sufficient to support its orders.
3. The Commission's findings and orders are supported by substantial evidence.

Circuit Judge.

District Judge.

District Judge.

Entered July —, 1936.

922 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In
923 Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

Objections of defendants, United States and Interstate Commerce Commission to findings of fact and conclusions of law proposed by plaintiffs

Defendants, United States and Interstate Commerce Commission, object to the findings of fact and conclusions of law proposed by the plaintiffs on the following grounds:

I

1. Plaintiffs' proposed findings of fact are, as a whole, totally inadequate and insufficient, and constitute an incomplete, inaccurate and erroneous view of the 18,000 pages of testimony and 500 exhibits of record;

(a) they do not set forth the facts of record concerning physical and other characteristics of the "spotting" service or the actual conditions under which it is performed, but consist, instead, of mere conclusions;

924 (b) they erroneously assume that the physical conditions and other circumstances affecting the performance of the service are the same at each of the plants of the six plaintiffs;

(c) some of the conclusions, proposed as findings of fact, are conclusions of law, as will be pointed out particularly hereinafter;

(d) some of the statements and conclusions of fact are wholly erroneous and are contrary to the evidence, as will be shown hereinafter.

2. Plaintiffs' findings "1" and "2" wholly fail to set forth any facts concerning the physical arrangement of the plant of any plain-

tiff, and any facts concerning the actual circumstances of the "spotting" operation, and ignore the fact that the allowance tariffs are mere exceptions, in respect of particular shippers, namely, the plaintiffs, to the tariffs which publish the transportation rates and constitute the "holding out" of the railroads to all shippers.

3. Plaintiffs' finding "3" is erroneous and contrary to the facts of record. For example, the evidence referred to in defendants' brief (pp. 21 to 30) proves that there has never been and is not now a "custom and practice" of railroads, either over the country generally or at the particular plants of plaintiffs of performing "spotting" service for shippers generally or for plaintiffs within industrial plants without charge in addition to line-haul rates, or of paying shippers generally or the plaintiffs for performing the spotting service. On the contrary, the undisputed facts, concerning performance of such service at plaintiffs' plants, are (1) that at the Vandergrift plant (selected by its counsel as typical) of American Sheet & Tin
925 Plate Company, the industry has always performed the spotting service and the railroad paid it no allowance whatever until 1917, and that since the plant began operations in 1902 the railroad has always delivered and received cars to and from that plaintiff upon the designated and agreed interchange tracks.

(2) At the plant of Allegheny Steel Company the spotting service has always been performed by the plaintiff, and for a period of 29 years the railroad refused to pay an allowance, and did not do so until 1929, after resisting a complaint before the Commission, and during the entire existence of the plant the custom has been to deliver and receive cars to and from plaintiff on the agreed interchange tracks.

(3) At the Ford City plant of Pittsburgh Plate Glass Company, the railroad performed the spotting service prior to 1903, but from that year to 1927, it was performed by plaintiff at its own expense and, since the latter year, with an allowance from the railroad; and from 1903 to the present the railroad delivered and received cars to and from that plaintiff on agreed interchange tracks. That there was no "custom" of the railroad, or recognition by it of a legal duty to perform or pay for plant "spotting" is further shown by the fact that the railroad resisted plaintiff's suit before the Commission in 1919, in which the Commission refused to hold that it was the railroad's legal duty to perform or pay for the service, but that it must cease practicing undue prejudice resulting from its refusal to treat plaintiff and certain of its competitors alike.

(4) At the plant of Weirton Steel Company the railroads performed the spotting service for the first 10 years, but from
926 1919 to 1921, it did not perform the service or pay plaintiff an allowance for performing it at several of the departments of the plant. Since 1921 the railroad has performed all the service, and plaintiff has declined to perform it for a published allowance of $1.23 per car. During the same period the same railroad neither

made allowances to nor performed the spotting service for the Allegheny Steel Company, or Pittsburgh Plate Glass Company (Ford City Plant), or West Leechburg Steel Company.

(5) The West Leechburg Steel Company performed the spotting service at its plant without an allowance from the railroad until 1927. During a short portion of that year the railroad performed the service. Except for that short period the "custom" of the railroad has always been to deliver cars to and receive them from plaintiff on the agreed interchange tracks.

(6) At the Crystal City, Mo., plant of Pittsburgh Plate Glass Company neither of the two railroads serving that plant has ever performed the "spotting" service, and both have always effected delivery and receipt of cars to and from plaintiff upon agreed yard or interchange tracks. Apparently plaintiff performed the service at its own expense prior to 1908, for until that year the St. Louis-San Francisco Railroad paid no allowance for the service. The Missouri-Pacific Railroad (through its subsidiary line), began paying allowances in 1923, "merely as a traffic inducement." Prior thereto it neither paid allowances or performed the service.

4. Plaintiffs' finding "4" is misleading and its implications are erroneous, for if, as found by the Commission, the railroads' transportation duty under the line-haul rates, begins and ends on
927 the interchange tracks at plaintiffs' respective plants, there could be no occasion for separate publication of additional "transportation" charges.

5. Plaintiffs' finding "5", in stating that "the terminal switching service performed is covered by the railroads' published tariffs, and is part of the line-haul freight charge", is vague and confusing. The railroads' line-haul tariffs do not, in terms or by custom and usage, include performance of the spotting service. The remaining portion of finding "5" is merely an erroneous conclusion.

5. The first two sub-divisions of plaintiffs' finding "6" contain erroneous and misleading statements: Instead of the affirmative showing that "none of the industries has refused to permit the railroad to enter upon the industrial tracks" the statements of witnesses of the plaintiffs on this hypothetical question is typified by that of Witness Carr who said (R. 10161) the Allegheny Steel Company would be willing to have the railroad spot the cars "if they do it as expeditiously and as efficiently as we do it ourselves", and "when we wanted it and as we wanted it spotted."

The second sub-division of said finding "6" is clearly in error as to some of the plants in stating "the physical condition and layout of the industrial tracks will accommodate the locomotive power of the carriers without hazard or excessive delay." For example, Witness Cramer stated (R. 10455) that he knew of no physical condition in the tracks and plants of the American Sheet & Tin Plate Company which would prevent the Pennsylvania Railroad locomotives from reaching all spotting points within the plants of that Company,

and that "generally speaking, the points could be reached with railroad power." But Witness Kulp, an employee of the Pennsyl-
928 vania testified (R. 10463, 10465) that although the spotting could be performed with certain types of switching engines "We could not with the power that we are using in that district", and that even the smaller switching engines used in 1917 would not negotiate the curves in the tracks of the Scottdale plant. And Witness Dixon, also of the Pennsylvania, testified (R. 10466) that the locomotives used by the Pennsylvania in the vicinity of the Vandergrift plant "would not negotiate all the curves" at that plant, and (R. 10467) that, to perform the service the Pennsylvania would have to bring in a particular type of engine for the purpose of serving that plant; and Witness Beltz, of the Baltimore & Ohio Railroad, testified (R. 10472) that it would require a smaller type of engine to negotiate the curves in the Scottdale plant than that railroad is now using on the line serving the plant. Witness Dixon made the same statement (R. 10163–4) with respect to the tracks in the plant of Allegheny Steel Company.

Witness for the Frisco Railroad testified (R. 6373–4) that that carrier had no engine at Crystal City, Mo., which could switch that plant of Pittsburgh Plate Glass Company; that if both the Frisco and the Missouri-Pacific undertook to spot cars in the plant the arrangement of the tracks was such that one would be delayed until the other completed its switching; and that the switching would be much more complicated than that carrier's team track switching and would necessarily require "considerable" time on account of the arrangement of buildings, tracks, and men working in the plant.

The third sub-division of finding "6" is not an affirmative finding of fact, but is a vague statement of conclusions made to negative facts, and is also erroneous.

929 7. Plaintiffs' finding "7" is not a finding of fact but is a conclusion of law.

8. Plaintiffs' finding "8" is irrelevant and immaterial, in that, the amount of the allowances paid is not in issue. Moreover, no allowance is paid to Weirton Steel Company.

9. Plaintiff's finding "9" is, in the first part, an interpretation of the Commission's reports, and, in the last part, a conclusion of law.

II

These defendants object to the conclusions of law proposed by plaintiffs, on the grounds:

1. The proposed conclusions are erroneous, and do not respond to the questions of law presented in this judicial review of the administrative actions of the Commission.

2. Conclusions 1, 2, 3, 5, and 7 are erroneous.

3. Conclusion 4 is abstract and has no applicability to the cases at bar.

4. Conclusion 6 is vague and indefinite, and is without applicability to the facts in the cases at bar, or is erroneous if it means that the Commissions has not made the requisite findings in these cases.

Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General.
Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.
Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel, Interstate Commerce Commission.
Nelson Thomas,
NELSON THOMAS,
Attorney, Interstate Commerce Commission.

JUNE 29, 1936.

No. 3110. In Eq. Received and placed in file this 30th day of June 1936. G. H. Berger, Clerk.

930 [File endorsement omitted.]

930-1 In United States District Court

No. 3110 in Equity, No. 3111 in Equity, No. 3112 in Equity, No. 3113 in Equity, No. 3130 in Equity, No. 3136 in Equity

[Titles omitted.]

Findings of Fact and Conclusions of Law on Consolidated Record

Filed July 29, 1936

I. Findings of Fact

The foregoing six cases having been heard and tried, by agreement of counsel, on one consolidated record, embracing the record before the Interstate Commerce Commission and other relevant evidence, upon due consideration the Court enters the following findings of fact:

930-2 1. The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Fort City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows: American Sheet & Tin Plate Company, Vandergrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Brakenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and the West Leechburg Steel Company at Leechburg, Penn-

sylvania. All of these plants are served by the Pennsylvania Railroad Company, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company, common carriers engaged in interstate commerce.

2. At each of plaintiffs' plant, terminal switching is performed in connection with the receipt and delivery of freight under the provisions of duly filed and published railroad tariffs, which provide that the industry will perform the terminal switching service for account of the railroad company and that the industry will be allowed for such service, out of the current freight rates, the actual cost for service performed but not exceeding specified amounts per car.

3. By long continued custom and practice of both carriers
930–3 and shippers such terminal switching service, namely, the placement of cars in position accessible to consignors and consignees respectively for loading and unloading, is part of the transportation service which the carriers are obliged to perform under the compensation afforded by the published freight rates.

4. The carriers have not provided in their published tariffs any separately established charges for such terminal switching services to be exacted in addition to the published freight rates.

5. That in each of the present cases the terminal switching service performed is covered by the railroads' published tariffs, and is a part of the line-haul freight charge, and where the plaintiffs have been engaged by the railroad companies to do this "spotting service" themselves, they are entitled to the allowances provided for in the published freight tariffs.

6. In the present cases, none of the industries has refused to permit the railroad to enter upon the industrial tracks; the physical condition and layout of the industrial tracks will accommodate the locomotive power of the carriers without hazard or excessive delay; and the industries receiving the allowances do not occupy large areas with many scattered plants, connected with an intricate system of industrial tracks and used chiefly as industrial facilities.

7. In the present cases there was no substantial evidence to support
a conclusion that the so-called interchange tracks at any of
930–4 these industries are points where the cars would be either accessible or convenient for loading by the consignor or unloading by the consignee.

8. There was no evidence of record before the Commission tending to show that the allowance in any of these cases was excessive.

9. In none of the present cases was there any finding of the Commission that the allowance is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, nor was there any substantial evidence on which the Commission could have based such findings.

II. Conclusions of Law

Upon the consolidated record in these cases and the foregoing findings of fact, the Court enters the following conclusions of law:

1. The placement of cars at reasonable convenient and accessible places for loading or unloading within industrial plants, including those of plaintiffs, is a common carrier service to which shippers are entitled, and which the carriers are in duty bound to perform, and is a transportation service under the Interstate Commerce Act, particularly under paragraph (3), section 1, thereof. Certain extraordinary circumstances, not present in these cases, may relieve or limit this obligation.

2. The carriers may either perform this "spotting service" themselves or engage others, including shippers and owners of
930-5 property transported, to do it, and pay therefor a reasonable compensation out of their freight rates, without violating the law.

3. Such an allowance to a shipper, when provided in a published tariff of the carrier, cannot be considered as a rebate or in violation of Section 6 of the Interstate Commerce Act.

4. A practice of a carrier may not be condemned because of the fact that it is beneficial to the shipper as well as the carrier.

5. The Commission was without power to prohibit entirely allowances for doing "spotting service."

6. To support a cease-and-desist order by the Commission, it must make the necessary quasi-jurisdictional findings of fact, that the rate or practice complained of was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful, or the order is void.

7. The orders of the Commission in the present cases are beyond its statutory power and should be set aside.

J. WARREN DAVIS,
Circuit Judge.

R. M. GIBSON,
District Judge.

F. P. SCHOONMAKER,
District Judge.

Entered July 29, 1936.

931 In United States District Court for the Western District of Pennsylvania

No. 3110 In Equity

AMERICAN SHEET & TIN PLATE COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

Decree

Filed July 29, 1936

And now, this 29th day of July 1936, this case having come on for further hearing, and having been argued by counsel, it is ordered, adjudged, and decreed as follows:

The enforcement, operation, and execution of the order of the Interstate Commerce Commission entered July 5, 1935, and entitled "American Sheet & Tin Plate Company Terminal Allowance, Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services", and directed against The Pennsylvania Railroad Company and The Baltimore and Ohio Railroad Company, respondents in said proceeding, are hereby permanently enjoined, and said order is hereby set aside and annulled.

J. WARREN DAVIS,
Circuit Judge.

R. M. GIBSON,
District Judge.

F. P. SCHOONMAKER,
District Judge.

[Filed endorsement omitted.]

932 In United States District Court for the Western District of Pennsylvania

No. 3111 In Equity

ALLEGHENY STEEL COMPANY

v.

UNITED STATES OF AMERICA

Decree

Filed July 29, 1936

And now, this 29th day of July 1936, this case having come on for further hearing, and having been argued by counsel, it is ordered, adjudged, and decreed as follows:

The enforcement, operation, and execution of the order of the Interstate Commerce Commission entered June 7, 1935, and entitled "Allegheny Steel Company Terminal Allowance Ex Parte 104,

Practices of Carriers Affecting Operating Revenues or Expenses Part II, Terminal Services" and directed against The Pennsylvania Railroad Company, respondent in said proceeding, are hereby permanently enjoined, and said order is hereby set aside and annulled.

J. WARREN DAVIS,
Circuit Judge.
R. M. GIBSON,
District Judge.
F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

933 In United States District Court for the Western District of Pennsylvania

No. 3112 In Equity

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA

Decree

Filed July 29, 1936

And now, this 29th day of July 1936, this case having come on for further hearing, and having been argued by counsel, it is ordered, adjudged, and decreed as follows:

The enforcement, operation, and execution of the order of the Interstate Commerce Commission entered June 25, 1935, and entitled "Pittsburgh Plate Glass Company Terminal Allowance Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses Part II, Terminal Services" and directed against The Pennsylvania Railroad Company, respondent in said proceeding, are hereby permanently enjoined, and said order is hereby set aside and annulled.

J. WARREN DAVIS,
Circuit Judge.
R. M. GIBSON,
District Judge.
F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

934 In United States District Court for the Western District of Pennsylvania

No. 3113 In Equity

WEIRTON STEEL COMPANY

v.

UNITED STATES OF AMERICA

Decree

Filed July 29, 1936

And now, this 29th day of July 1936, this case having come on for further hearing, and having been argued by counsel, it is ordered, adjudged, and decreed as follows:

The enforcement, operation and execution of the order of the Interstate Commerce Commission entered June 24, 1935, and entitled "Weirton Steel Company Terminal Allowance Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses Part II, Terminal Services" and directed against The Pennsylvania Railroad Company, respondent in said proceeding, are hereby permanently enjoined, and said order is hereby set aside and annulled.

J. WARREN DAVIS,
Circuit Judge.

R. M. GIBSON,
District Judge.

F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

935 In United States District Court for the Western District of Pennsylvania

No. 3130 In Equity

WEST LEECHBURG STEEL COMPANY

v.

UNITED STATES OF AMERICA

Decree

Filed July 29, 1936

And now, this 29th day of July 1936, this case having come on for further hearing, and having been argued by counsel, it is ordered, adjudged, and decreed as follows:

The enforcement, operation, and execution of the order of the Interstate Commerce Commission entered July 29, 1935, and entitled

"West Leechburg Steel Company Terminal Allowance Ex Parte 104 Practices of Carriers Affecting Operating Revenues or Expenses Part II, Terminal Services" and directed against The Pennsylvania Railroad Company, respondent in said proceeding, are hereby permanently enjoined, and said order is hereby set aside and annulled.

J. WARREN DAVIS,
Circuit Judge.
R. M. GIBSON,
District Judge.
F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

936 In United States District Court for the Western District of Pennsylvania

No. 3136 In Equity

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA ET AL.

Decree

Filed July 29, 1936

And now, this 29th day of July 1936, this case having come on for further hearing, and having been argued by counsel, it is ordered, adjudged, and decreed as follows:

The enforcement, operation, and execution of the order of the Interstate Commerce Commission entered September 12, 1935, and entitled "Pittsburgh Plate Glass Company Terminal Allowance Ex Parte 104 Practices of Carriers Affecting Operating Revenues or Expenses Part II, Terminal Services" and directed against Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company, respondents in said proceeding, are hereby permanently enjoined, and said order is hereby set aside and annulled.

J. WARREN DAVIS,
Circuit Judge.
R. M. GIBSON,
District Judge.
F. P. SCHOONMAKER,
District Judge.

[File endorsement omitted.]

937 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

938 *Notice of Appeal*

Filed Sept. 25, 1936

To AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY, PITTSBURGH PLATE GLASS COMPANY, WEIRTON STEEL COMPANY, WEST LEECHBURG STEEL COMPANY, PITTSBURGH PLATE GLASS COMPANY, *Plaintiffs:*

Please take notice that, pursuant to the statutes and rules of court in such case made and provided, the United States of America, defendant, and the Interstate Commerce Commission, intervening defendant, in the above-entitled causes, and each of them, do hereby appeal to the Supreme Court of the United States from the final decrees of the District Court made and entered on the 29th day of July 1936, which set aside, annulled, suspended, and permanently enjoined the orders of the Interstate Commerce Commission complained of in said causes.

September 25, 1936.

CHARLES F. UHL,
United States Attorney.
JOHN DICKINSON,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel Interstate Commerce Commission.

Service of the foregoing notice of appeal and the receipt of a copy thereof are hereby acknowledged this 25th day of September 1936.

REED, SMITH, SHAW, & MCCLAY,
Solicitors for American Sheet & Tin Plate Company.
WALTER BURCHMORE, AND BELNAP,
PATTERSON, GOEHRING, MCCLINTOCK, AND COLLINS,
Solicitors for Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, and West Leechburg Steel Company.

[File endorsement omitted.]

939 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

940 *Petition for appeal*

Filed Sept. 25, 1936

The United States of America, defendant, and the Interstate Commerce Commission, intervening defendant in the above-entitled causes, feeling themselves aggrieved by the final decrees entered in said causes by this Court July 29, 1936, pray an appeal from said decrees to the Supreme Court of the United States.

The particulars wherein they consider the decrees erroneous are set forth in the assignment of errors accompanying this petition and to which reference is hereby made.

Said defendants pray that a transcript of record, proceedings and papers on which said decrees were made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated September 25, 1936.

CHARLES F. UHL,
United States Attorney.
JOHN DICKINSON,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel Interstate Commerce Commission.

[File endorsement omitted.]

941 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

942 *Assignment of errors*

Filed Sept. 25, 1936

United States of America and Interstate Commerce Commission, defendants in the above entitled cases, now come and file the following assignment of errors in connection with their petition for an appeal from the final decree entered by this Court on July 29, 1935, in each of said cases:

The District Court erred:

1. In entering the decrees enjoining, setting aside, and annuling the orders of the Interstate Commerce Commission.

2. In holding that the switching and "spotting" of cars within the respective industrial plants of the plaintiffs is "transportation" within the meaning of Section 1 (3) of the Interstate Commerce Act.

3. In holding as follows: "By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right-of-way, and also on private industrial tracks off the carriers' right-of-way and on the private property of the industries served. Such services are included in the established rates, unless in express terms the published tariffs otherwise provide."

4. In holding that "'spotting services' are recognized in law as common-carrier services to which the shippers are entitled, and which the carriers are in duty bound to perform."

5. In holding that in these cases there are "no circumstances which would relieve the carriers involved from the duty of 'spotting' the cars as a part of the transportation imposed upon them by law."

6. In holding that the "spotting" of cars within the industrial plants of the plaintiffs "is covered by the railroads' published tariffs, and is a part of the line-haul freight charge, and that where the plaintiffs do this 'spotting service' themselves they are entitled to the compensation provided for in the published freight tariffs."

7. In holding that the Commission's orders in these cases are not based on jurisdictional findings necessary to support them
943 and that the injunctions sought should be granted in all these cases.

8. In holding that "the Commission was without power to prohibit entirely allowances for doing 'spotting service.'"

9. In holding that the Commission had power only to "review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful", and in holding that the Commission failed to make findings sufficient to support its orders.

10. In holding that the orders of the Commission in these cases are beyond its statutory power, and that the injunctions prayed for should issue.

11. In accepting and adopting the findings of fact and conclusions of law suggested by the plaintiffs, and in failing to sustain defendants' objections thereto, and in refusing the findings and conclusions suggested by the defendants; and the court particularly erred in entering its findings numbered "3", "4", "5", "6", "7", and "9", and in findings as facts the matters and things therein stated.

12. In the several conclusions of law which it entered, and in each of said conclusions.

13. In failing and refusing to hold that the Commission's orders in these cases are within the power conferred upon it by the Interstate Commerce Act.

14. In failing and refusing to hold that the findings made by the Commission in each of these cases are sufficient to support the respective orders.

15. In failing and refusing to hold that each of the orders in these cases is supported by substantial evidence.

16. In failing and refusing to dismiss the petition in each of these cases for want of equity.

17. In failing and refusing to find and hold that the "spotting" of cars within the industrial plants of the plaintiffs in these
944 cases is not "transportation" for which the carriers are compensated under their line-haul rates.

18. In failing and refusing to hold that the "spotting" of cars within the industrial plants of the plaintiffs is a private or plant service which the respective railroads may not lawfully perform or pay plaintiffs for performing under their line-haul rates or without charge in addition to said rates.

19. In failing and refusing to find that no custom or practice, long continued or otherwise, exists among plaintiffs and the railroads which serve their plants or among carriers and shippers generally, of including and performing or paying for "spotting" of cars within industrial plants as part of the service for which railroads are compensated by their line-haul freight rates.

20. In failing and refusing to give and accord proper legal force and effect to the evidence of record in these cases.

21. In failing and refusing to consider separately and to give proper legal effect to the particular evidence showing the actual physical and other circumstances and conditions under which the "spotting" services are performed at the particular plants of the respective plaintiffs, and in assuming that the facts and circumstances concerning the nature of the "spotting" service and the conditions of its performance are the same at each of the plants of the six plaintiffs.

CHARLES F. UHL,
United States Attorney.
JOHN DICKINSON,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

SEPTEMBER 25, 1936.

[File endorsement omitted.]

946 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

947 *Notice to Attorney General of the State of Pennsylvania*

Filed Oct. 19, 1936

To the honorable, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA:

Pursuant to Urgent Deficiencies Act of October 22, 1913, 38 Stat. 221, you are hereby notified that the defendant, United States of America, and the Interstate Commerce Commission, intervening defendant in the above-entitled causes, have taken an appeal to the Supreme Court of the United States from the final decrees of the United States District Court, entered July 29, 1936, and the order allowing the appeal makes the same returnable within forty days from the date thereof.

CHARLES F. UHL,
United States Attorney.
JOHN DICKINSON,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

Service of a copy of the foregoing notice is hereby acknowledged this 30th day of September 1936.

C. J. MARGIOTTI,
Attorney General, State of Pennsylvania.

[File endorsement omitted.]

948 In the United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

949 *Order allowing appeal*

Filed Sept. 25, 1936

In the above-entitled causes, the United States of America, defendant, and the Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decrees of this Court in these causes entered July 29, 1936, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and decreed that the appeals be, and the same are hereby, allowed as prayed for. This 25 day of September 1936.

N. McVICAR,
United States District Judge.

[File endorsement omitted.]

950 [Citation in usual form showing service on appellees, filed Sept. 25, 1936, omitted in printing.]

952 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

953 *Order extending time for filing record*

Filed Oct. 17, 1936

On motion of counsel for United States of America and Interstate Commerce Commission, Appellants, and good cause therefor having been shown, it is ordered that the time for filing the record and docketing the appeal in the above-entitled causes in the Supreme Court of the United States be, and the same is hereby, extended to and including January 15, 1937.

This October 17th, 1936.

F. P. SCHOONMAKER,
United States District Judge.

Consented to:

REED SMITH SHAW & McCLAY,
Counsel for American Sheet & Tin Plate Company.

PATTERSON GOEHRING McCLINTOCH & COLLINS,
JOHN S. BURCHMORE,
Counsel for Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company, and Pittsburgh Plate Glass Company.

953b [File endorsement omitted.]

954 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

955 *Order extending time for filing record*

Filed Jan. 14, 1937

On motion of counsel for United States of America and Interstate Commerce Commission, Appellants, and good cause therefor having been shown, it is ordered that the time for filing the record and docketing the appeal in the above-entitled causes in the Supreme Court of the United States be, and the same is hereby, extended to and including February 15, 1937.

This January 14, 1937.

F. P. SCHOONMAKER,
United States District Judge.

Consented to:

REED SMITH SHAW & MCCLAY,
Counsel for American Sheet & Tin Plate Company.

WALTER BURCHMORE & BELNAP,
1522 First Natl. Bank Bldg., Chicago, Ill.

PATTERSON GOEHRING MCCLINTOCH & COLLINS,
928 Frick Bldg., Pittsburgh, Pa.
Counsel for Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company, and Pittsburgh Plate Glass Company.

955b [File endorsement omitted.]

956 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

957 *Summons and severance*

Filed Oct. 17, 1936

To: MISSOURI PACIFIC RAILROAD COMPANY,
GUY A. THOMPSON, *Trustee.*
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
J. M. KURN and JOHN G. LONSDALE, *Trustees.*

You are hereby invited to join with the United States, defendant, and Interstate Commerce Commission, intervening defendant, in an appeal to the Supreme Court of the United States which they will seasonably prosecute from the final decrees of the above-entitled Court entered July 29, 1936, setting aside, annulling, and enjoining the enforcement of the orders of the Interstate Commerce Commission which are described in the bills of complaint in the above-entitled causes, wherein you are defendants in No. 3136, as indicated in the above titles of said causes.

In the event of your failure to join, the United States of America and the Interstate Commerce Commission will prosecute the appeal for the reversal of said final decrees of the District Court without joining you. September 25, 1936.

CHARLES F. UHL,
United States Attorney.
JOHN DICKINSON,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this 7th day of September 1936.

H. H. LARIMON,
Attorney for Missouri Pacific Railroad Company,
GUY A. THOMPSON, *Trustee.*
M. G. ROBERTS,
Attorneys for St. Louis-San Francisco Railway Company,
J. M. KURN and JOHN G. LONSDALE,
Trustees.

[File endorsement omitted.]

958 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

959 *Stipulation re record*

Filed Feb. 11, 1937

It is hereby stipulated and agreed by and between counsel for the parties to the above-entitled causes, for the purpose of settling the record for the appeals therein to the Supreme Court of the United States, that:

1. The narrative statement of testimony attached hereto is a true and correct transcript in narrative form of that part of the oral testimony contained in the certified copy of the record of proceedings before the Interstate Commerce Commission introduced in evidence in these causes, which the parties hereto deem to be essential in the determination of the issues in said causes.

2. The entire record of testimony and exhibits before the Interstate Commerce Commission (introduced in evidence in this court as an exhibit and consisting of printed volumes 1 to 12, inclusive, of oral testimony, and 1 to 5, inclusive, of exhibits) and the transcript of testimony and other exhibits introduced at hearing on application

for final injunction before the District Court, shall be transmitted in original form by the clerk of this court to the clerk of the Supreme Court and shall there be retained as a part of the record in these causes, and may be referred to by the Supreme Court and by counsel for appellants and appellees in their briefs and upon oral argument of these causes in the Supreme Court.

Dated February 11, 1937.

CHARLES F. UHL,
United States Attorney,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission,
Counsel for appellants.

960 DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
Counsel for American Sheet & Tin Plate Company, Appellee.

JOHN S. BURCHMON,
PATTERSON, GOEHRING, MCCLINTOCK & COLLIER,
Counsel for Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company, and Pittsburgh Plate Glass Company, Appellees.

Order

It is ordered that the foregoing stipulation and attached statement of evidence be and they are hereby approved, and that in preparing his certificate and transmitting the transcript of record to the Supreme Court of the United States, the Clerk is directed to proceed in accordance therewith.

NELSON MCVICAR,
United States District Judge.

Dated February 11, 1937.
[File endorsement omitted.]

961 In United States District Court

In Equity No. 3110, In Equity No. 3111, In Equity No. 3112, In Equity No. 3113, In Equity No. 3130, In Equity No. 3136

[Titles omitted.]

962 *Praecipe for transcript of record*

Filed Feb. 11, 1937

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in the above entitled causes to be transmitted to the Supreme Court of the United

States pursuant to the appeals to said Court heretofore taken, and incorporate in said transcript the following:

1. Bill of complaint in No. 3110, and petitions in Nos. 3111, 3112, 3113, 3130, and 3136, and all exhibits filed with and as part of said bill of complaint and each of said petitions.

2. Order in each of said causes convening three-judge court.

3. Answer of United States of America to said bill of complaint and to each of said petitions.

4. Intervention of Interstate Commerce Commission in each of said causes and its answer to said bill of complaint and to each of said petitions.

5. Certified copies of Terminal Allowance Tariffs and discontinuance thereof, 7 in number.

6. Certified copy of notice of hearing before the Interstate Commerce Commission.

7. Orders dismissing Pennsylvania Railroad Company as a defendant in Nos. 3110, 3111, 3112, 3113, and 3130.

8. Interlocutory injunctions in all cases.

9. Record of testimony and exhibits before the Interstate Commerce Commission, in original form as introduced in evidence before the Court as Exhibit — (consisting of printed volumes 1 to 12, inclusive, of oral testimony, and volumes 1 to 5, inclusive, of exhibits).

10. Narrative statement of evidence before the Interstate Commerce Commission.

963 11. Stipulation re transcript of record and order thereon.

12. Stipulation as to I. C. C. record before three-judge court.

13. Order consolidating six cases for hearing on one record.

14. Transcript of proceeding on final hearing.

15. Opinion.

16. Plaintiffs' requested findings of fact and conclusions of law.

17. Findings of fact and conclusions of law requested by United States and Interstate Commerce Commission.

18. Objections of United States and Interstate Commerce Commission to findings and conclusions requested by plaintiffs.

19. Findings of fact and conclusions of law adopted by the court.

20. Final decree in each of said causes.

21. Notice of appeals (with acknowledgments of service).

22. Petition for appeals.

23. Assignments of error.

24. Statement as to jurisdiction.

25. Notice pursuant to Rule 12 of Supreme Court and acknowledgment of service thereof.

26. Notice to Attorney General of Pennsylvania.

27. Order allowing appeals.

28. Citation on appeals.

964 29. Orders of Oct. 17th, 1936, extending time for filing the record and docketing the appeals in the Supreme Court.

30. Orders of Jan. 14th, 1937, extending time for filing the record and docketing the appeals in the Supreme Court.
31. Summons and severance in No. 3136.
32. This praecipe for transcript of record and acknowledgment thereof.
33. Clerk's certificate.
Dated February 11th, 1937.

CHARLES F. UHL,
United States Attorney,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission,
Counsel for Appellants.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
Counsel for American Sheet & Tin Plate Company, Appellee.
JOHN S. BURCHMORE,
PATTERSON GOEHRING MCCLINTOCK & COLLINS,
Counsel for Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company, and Pittsburgh Plate Glass Company, Appellees.

966 [Clerk's Certificate to foregoing transcript omitted in printing.]

967 In Supreme Court of the United States

Statements of points relied upon by appellants and designation of parts of the record to be printed

Filed Feb. 6, 1937

I

United States of America and Interstate Commerce Commission, appellants, will rely upon the following points in brief and oral argument before this Court on their appeals in the above entitled causes:

968 1. The orders issued by the Commission in these cases, requiring the specified railroads to cease the performance of "spotting" cars within the plants of appellees without charge in addition to line-haul rates, or payment of allowances to appellees for performing such "spotting", were within its authority under the Interstate Commerce Act.

2. It has never been, and is not now, general railroad "custom and usage" to treat the "spotting" service here involved as included in the transportation obligation under the line-haul rate.

(a) Court decisions show that there has been no such "custom and usage."

(b) Evidence of record, of many kinds, sharply disproves the existence of any such general "custom and usage."

(c) Even if the evidence established such general "custom and usage", the Commission is not bound by it, but is empowered to condemn it where, as here, it finds, upon substantial evidence, that it violates the Act.

3. The findings made by the Commission in each case are sufficient to support the accompanying order.

4. The orders are supported by substantial evidence.

II

Appellants further state that the entire record in these causes, as filed in this Court, is necessary for consideration of the foregoing points, and that the entire transcript of record as transmitted by the clerk of the district court should be printed by the Clerk of this Court excepting those parts specified in "Stipulation Re Printing Record" filed in this Court.

Stanley Reed,
STANLEY REED,
Solicitor General,
Robert H. Jackson,
ROBERT H. JACKSON,
Assistant Attorney General,
969 Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission,
Counsel for Appellants.

Dated February 13, 1937.

970 In Supreme Court of the United States

Stipulation re printing record

Filed Feb. 16, 1937

It is hereby stipulated by and between counsel for the appellants and counsel for the appellees in the above entitled causes that:

1. The record of testimony and exhibits before the Inter-
971 state Commerce Commission (consisting of printed volumes 1 to 12, inclusive, of oral testimony, and volumes 1 to 5, inclusive of exhibits) which was transmitted in original form by the clerk of the court below to the Clerk of this Court, shall not be printed by the Clerk of this Court but shall be retained as a part of the record in these causes and may be referred to by the Court and by counsel for the parties to said causes in their briefs and arguments in said causes.

2. Exhibits A–151, A–152, C–147, C–153, C–156, C–160, and C–163, contained in the record before the Interstate Commerce Commission, and being blueprints or maps showing the location of tracks and buildings within the respective plants of the appellees, are impracticable of reproduction by printing, and that therefore appellants shall furnish to the Clerk for the use of the Court 11 planograph or photostat copies of each of said exhibits and copies to counsel for appellees.

3. Exhibit A to each of the bills or petitions is identical, being a copy of the Interstate Commerce Commission's report of May 14, 1935, in Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services. Said Exhibit A shall be printed as it appears in the bill of American Sheet & Tin Plate Company v. United States, No. 3110, but shall be omitted in printing the petitions in the other five of said causes, with appropriate statement of the omission and reference to said exhibit in the printed record.

4. Except as above specified, all of the transcript of record transmitted by the clerk of the district court to the Clerk of this Court shall be printed.

Dated February 11, 1937.

Stanley Reed,
STANLEY REED,
Solicitor General,

972 Elmer B. Collins,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission,
Counsel for Appellants.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
Counsel for American Sheet & Tin Plate Company, Appellee.
JOHN S. BURCHMORE,
PATTERSON, GOEHRING, MCCLINTOCH & COLLINS,
Counsel for Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company, and Pittsburgh Plate Glass Company, Appellees.

[File endorsement omitted.]

(Endorsement on cover): File No. 41,274. W. Pennsylvania, D. C. U. S. Term No. 734. The United States of America and Interstate Commerce Commission, appellants, vs. American Sheet & Tin Plate Company, Allegheny Steel Company, and Pittsburgh Plate Glass Company, et al. Filed February 12, 1937. Term No. 734 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE 1937

FILE COPY

Supreme Court, U. S.
FILED
FEB 12 1937
CHARLES ELMORE CROPLEY
CLERK

No. 734

In the Supreme Court of the United States

OCTOBER TERM, 1936

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMERICAN SHEET & TIN PLATE COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 734

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMERICAN SHEET & TIN PLATE COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEIRTON STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEST LEECHBURG STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

125362—37——1

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12 of the Rules of the Supreme Court, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the above-entitled cases on appeal.

STATUTES

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. III, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. Code, Tit. 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

DECREES

The decrees sought to be reviewed were entered July 29, 1936.

The petition for appeal was filed and the order allowing the appeal was entered September 25, 1936.

THE NATURE OF THE CASES AND RULINGS BELOW

These suits were brought by appellees to enjoin and annul six orders of the Interstate Commerce Commission entered in a proceeding, instituted by the Commission upon its own motion, entitled *Ex*

Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services. The orders require the railroads therein named to cease paying allowances or refunds to appellees for moving or "switching" railroad cars to and from points within their industrial plants or performing that service free or without charge in addition to their line-haul rates. The Commission first issued a general report (209 I. C. C. 11) based on the general investigation, and then issued supplemental reports dealing with the terminal practices at particular industrial plants, which supplemental reports are accompanied by orders directed against the carriers serving those particular plants. The orders attacked in the instant cases were issued in connection with the following supplemental reports:

American Sheet and Tin Plate Company Terminal Allowance, 209 I. C. C. 719, July 5, 1935.

Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273, June 7, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467, June 25, 1935.

Weirton Steel Company Terminal Allowance, 209 I. C. C. 445, June 24, 1935.

West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213, July 29, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527, September 12, 1935.

Cars consigned to or by appellees are delivered to and received from them by the railroads upon interchange or "storage" tracks located upon and at the entrance to appellees' industrial plants. With their own locomotives, appellees (except Weirton Steel Company) then move or "switch" the cars from the interchange tracks to the particular points or "spots" within their plants when and as they require the contents of the loaded cars to be unloaded or the empty cars to be loaded at such "spots." (Such movement of cars to and from loading and unloading points within industrial plants is commonly called "car spotting.") On the theory that it is the duty of the railroads to perform this plant "spotting" service, appellees (except Weirton Steel Company) claim and receive from the railroads allowances or refunds out of the line-haul rates in amounts ranging from 65¢ to $1.28 for each loaded car so moved or switched by appellees. At the plant of the Weirton Steel Company, the railroad itself performs the "spotting" service free or without charge in addition to its line-haul rates, and the Weirton Company, of course, receives no allowance.

Upon consideration of the physical arrangement of the several plants and all the circumstances and conditions under which the spotting service is performed at each of the plants, the Commission stated its findings and conclusions of fact, of which the following with respect to the Weirton Steel Company are illustrative:

> We find that the switching service performed beyond the interchange tracks described of record is a plant service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates; that the performance of said service by respondent without reasonable charge therefor, or the payment of an allowance for the service if performed by the industry results in the industry's receiving a preferential service not accorded to shippers generally; and that by the payment of said allowance the respondent carrier refunds or remits a portion of the rates or charges collected or received as compensation for the interstate transportation of property in violation of section 6 (7) of the act.

The order in each case directs the carrier or carriers serving the plant of the particular appellee to cease and desist on or before a specified date and thereafter to abstain from the practices found unlawful in the accompanying supplemental report.

Hearing in the district court was had before a statutory court of three judges. Findings of fact and conclusions of law were made and a written opinion rendered. The court held in substance: (1) that the plant "spotting" service is a transportation service which the carriers are legally bound under their tariffs and by "custom" to perform; (2) that, while certain circumstances such as physical impossibility or refusal of shippers to allow the railroads access to plants would relieve the carriers from the duty of performing the

spotting service, no such circumstances were disclosed by the evidence in these cases; (3) that the Commission had power only to regulate the amount of allowances for such service, and that it, therefore, exceeded its power in issuing the orders prohibiting any allowance; and (4) that the Commission did not make findings which were essential to the validity of its orders, namely, that the allowances in these cases were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. The decrees annul, set aside, and permanently enjoin enforcement of the respective orders.

The questions presented are substantial. They involve not only the sufficiency of the evidence of record and the Commission's findings to support the six orders under attack, but also the very power of the Commission to prevent railroads from paying refunds or allowances to shippers for doing anything which they and the railroads choose to call "transportation" service, regardless of whether the thing done by the shippers is, in fact, a transportation service within the meaning of Section 15 (13) of the Interstate Commerce Act. The cases also involve the question whether the Commission has administrative power to determine the extent of the duty of railroads under their line-haul rates and what constitutes reasonable delivery of interstate shipments by railroad at the great industrial plants of large shippers.

United States v. *Idaho*, —— U. S. —— (No. 420), decided April 27, 1936;

United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490;

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454;

Merchants Warehouse Co. v. *United States*, 283 U. S. 501;

Los Angeles Switching Case, 234 U. S. 294.

Appended hereto is a copy of the opinion of the three-judge District Court filed May 23, 1936.

STANLEY REED,
Solicitor General,

CHARLES F. UHL,
United States Attorney,

JOHN DICKINSON,
Attorney Attorney General,

ELMER B. COLLINS,
Special Assistant to the Attorney General,

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
Counsel for Appellants.

Dated SEPTEMBER 25, 1936.

In the District Court of the United States for the Western District of Pennsylvania

---

No. 3110 IN EQUITY

AMERICAN SHEET & TIN PLATE COMPANY

v.

UNITED STATES OF AMERICA

No. 3111 IN EQUITY

ALLEGHENY STEEL COMPANY

v.

UNITED STATES OF AMERICA

No. 3112 IN EQUITY

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA

No. 3113 IN EQUITY

WEIRTON STEEL COMPANY

v.

UNITED STATES OF AMERICA

No. 3130 IN EQUITY

WEST LEECHBURG STEEL COMPANY

v.

UNITED STATES OF AMERICA

No. 3136 IN EQUITY

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA ET AL.

Before Circuit Judge J. WARREN DAVIS; District Judges R. M. GIBSON and F. P. SCHOONMAKER

125362—37——2

Opinion

(Filed May 23, 1936)

SCHOONMAKER, *District Judge:* The six above entitled cases involving similar causes were brought under the Act of Congress of October 22, 1913 (38 Stat. at Large 219); 28 U. S. C. A., Secs. 41, (28), 45, 46, 47, to enjoin orders of the Interstate Commerce Commission requiring railroad companies to discontinue payments of allowances to plaintiffs for the performance of certain terminal service commonly called "spotting."

These cases were heard before J. Warren Davis, Circuit Judge; R. M. Gibson and F. P. Schoonmaker, District Judges.

By agreement of counsel in open court, the trials of these six cases were consolidated; they were heard and are to be determined on one record.

The orders of the Interstate Commerce Commission involved in these suits were entered in a proceeding entitled "Ex Parte No. 104, Practices of Carriers affecting operating Revenues or Expenses, Part II, Terminal Services."

The specific orders involved in these suits were issued respectively in connection with supplemental reports to that in "Ex Parte No. 104" dealing with the terminal practices obtaining at the particular industrial plants of the plaintiffs, as follows:

> *American Sheet and Tin Plate Company Terminal Allowance,* 209 I. C. C. 719, July 5, 1935.

Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273, June 7, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467, June 25, 1935.

Weirton Steel Company Terminal Allowance, 209 I. C. C. 445, June 24, 1935.

West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213, July 29, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527, September 12, 1935.

The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows: American Sheet & Tin Plate Company, Vandegrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Breckenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and The West Leechburg Steel Company at Leechburg, Pennsylvania.

All of these plants are served by the Pennsylvania Railroad Company, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis,

San Francisco Railway Company, common carriers engaged in interstate commerce.

At each of plaintiffs' plants, terminal switching is performed in connection with the receipt and delivery of freight under the provisions of duly filed and published railroad tariffs.

We quote from a typical tariff (Pennsylvania R. R. Tariff), effective June 1, 1917, applying to coal and coke traffic switched by American Sheet & Tin Plate Company at Vandegrift, as defining this switching service:

> On all carload revenue shipments, destined to or coming from the plant of the American Sheet and Tin Plate Company, the latter company performs the terminal switching service for account of the Pennsylvania Railroad Company.
>
> The American Sheet and Tin Plate Company will be allowed for such service, out of the current Vandegrift, Pa., rate, the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet & Tin Plate Company, and the Pennsylvania Railroad Company, but not exceeding $1.10 per car.

The defendant railroad, pursuant to the several recited orders of the Interstate Commerce Commission, undertook to cancel and discontinue these switching allowances by tariffs, the wording of the tariff for the American Tin Plate Company at Vandegrift being typical of all:

> The Pennsylvania Railroad Company—Cancellation Notice—Local Freight Tariff —Terminal Allowances to American Sheet and Tin Plate Company at Vandegrift, Pa. * * * is hereby cancelled. Terminal allowances discontinued. Effective August 22, 1935. In compliance with Eighteenth Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104, Part 2, July 5, 1935.

The plaintiffs contend that these cancellation orders are unlawful because this "spotting" terminal switching service is a transportation service which the railroads are required by law to perform, and if the plaintiffs themselves perform it, they are entitled to compensation from the railroads. The Interstate Commerce Commission, on the other hand, contends that this service is not transportation service, because that service lawfully ends when the Railroads deliver the car for loading or unloading at the interchange or holding switch of the plant being served, and therefore the service complained of is a device to make an unlawful rebate to shippers.

The plaintiffs contend that the line-haul tariff rates cover not only delivery of cars to the interchange track of the industry, but also the delivery of cars beyond that point on a system of tracks leading to mills and warehouses, and "spotting" them at convenient points for loading and unloading; and that if the plaintiffs perform that service they are entitled to an allowance from the Railroad Company for that service.

The Interstate Commerce Commission contends that the line-haul tariff rate is for delivery of the freight car only at the interchange switch, and that the Railroad cannot be called upon either to "spot" freight cars at mill and warehouse platforms or to pay the shipper for doing what is exclusively its own work.

The question to be decided in the instant case is therefore whether the switching done by the plaintiffs within their own plants between the interchange or storage tracks and the platforms of their mills and warehouses is work that the Railroads are required to do as a part of transportation.

There appears to be no exact formula that can be applied in answering this question. The most that we can get from the decided cases is that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable: *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *New York Central & H. R. R. R. Co.* v. *General Electric Co.*, 114 N. E., 115, 117.

The Interstate Commerce Act (U. S. C. A. Title 49, C. 1, Sec. 1 (3) Definitions, defines "transportation" thus:

> * * * The term "transportation", as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for

> the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, * * * and handling of property transported. * * *
>
> This section further provides in the succeeding paragraph that "It shall be the duty of every common carrier to provide and furnish such transportation upon reasonable request therefor."

However, it is certain that "spotting service" is "transportation" within this definition, and therefore a common-carrier service up to certain limits, and includes the placement of cars in position accessible to the consignors and consignees respectively for loading and unloading. By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right of way, and also on private industrial tracks off the carriers' right of way and on the private property of the industries served. Such services are included in the established rates, unless in express terms the published tariffs otherwise provide: Car Spotting Charges, 34 I. C. C. 609.

We, therefore, reach the conclusion that "spotting services" are recognized in law as common-carrier service to which the shippers are entitled, and which the carriers are in duty bound to perform. In fact, the courts have held that writs of mandamus and mandatory injunctions will lie to enforce this right and compel this duty: *Missouri*

Pacific R. R. Co. v. *Larabee Flour Mills Co.*, 211 U. S. 612.

It is also certain that the carriers may either do this "spotting service" themselves or engage others, including shippers and owners of property transported to do it, and pay therefor a reasonable compensation out of their freight rates, without violating the law: *Mitchell Coal & Coke Co.* v. *Pennsylvania Railroad Company*, 230 U. S. 247. But this will not include special or particular "spotting service" such as described in *New York Central & Hudson River R. R. Co.* v. *General Electric Company*, 114 N. E. 115, over an intricate system of trackage when the railroad is not permitted to enter to extend any "spotting service" at all.

Typical of the circumstances which relieve the carrier from the duty of "spotting" cars may be noted: (a) where an industry refuses to permit the Railroad to enter upon the private industrial tracks; (b) where the physical condition and layout of the private industrial tracks will not accommodate the carriers' locomotive power without hazard or excessive delay; (c) where the industry occupies large areas with many scattered plants, connected by an intricate system of industrial tracks and used chiefly as industrial facilities.

In the instant cases, we find no circumstances which would relieve the carriers involved from the duty of "spotting" the cars as a part of the transportation imposed upon them by law. We further

find that such "spotting" service is covered by the Railroads, published tariffs, and is a part of the line-haul freight charge, and that where the plaintiffs do this "spotting service" themselves, they are entitled to the compensation provided for in the published freight tariffs.

Commissioner Mahaffie, dissenting from the majority report of the Commission, has in his report contained in the exhibits attached to the plaintiffs' petitions in the instant cases, clearly stated why the cease-and-desist orders issued by the Commission in the instant cases are not based on the jurisdictional findings necessary to support these orders and that the injunction sought should be granted in all these cases.

As we view the law, the Commission was without power to prohibit entirely allowances for doing "spotting service." It could review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory or otherwise unlawful: *Section 15 (par. (1) and (13) of Interstate Commerce Act); Interstate Commerce Commission* vs. *Louisville & Nashville Railroad Company,* 227 U. S. 88, 92; *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U. S. 433; *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, 105; *Interstate Commerce Commission* v. *Northern Pacific Railway Company,* 216 U. S. 538, 544; *United States* v. *Baltimore and Ohio Railroad Company,* 293 U. S. 454.

No such findings were made in the instant cases. The courts have uniformly held that to support a cease-and-desist order by the Commission, it must make the necessary quasi-jurisdictional findings of fact, or the order is void; *Florida* v. *United States*, 282 U. S. 191, 215; *United States* v. *Chicago, Milwaukee and St. Paul Railway Co.*, 294 U. S. 499.

Our conclusion is that the orders of the Commission complained of are beyond its statutory power, and that the injunction prayed for should issue.

Findings of fact, conclusions of law, and decree, in accordance with this opinion may be submitted.

U. S. GOVERNMENT PRINTING OFFICE: 1937

FILE COPY

FILED
MAR 20 1937
CHARLES ELMORE CROPLEY
CLERK

No. 734

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE AMERICAN SHEET & TIN PLATE COMPANY ET AL., APPELLEES

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

MARCH, 1937

SUBJECT INDEX

	Page
OPINIONS	2
JURISDICTION	2–3
QUESTIONS	3–4
STATUTES INVOLVED	5
STATEMENT	5–18
THE COMMISSION PROCEEDING	6–17
PROCEEDINGS IN COURT BELOW	17–18
SPECIFICATIONS OF ERRORS	18–21
SUMMARY OF THE ARGUMENT	21–27
ARGUMENT	28–116
INTRODUCTORY	28–30
I. The orders issued by the Commission in these cases, requiring the specified railroads to cease the performance of "spotting" cars within the plants of appellees without charge in addition to line-haul rates, or payment of allowances to appellees for performing their own "spotting", were within its authority under the Interstate Commerce Act	31–73
1. It has never been, and is not now, general railroad custom and practice to treat the "spotting" service here involved as included in the transportation obligation under the line-haul rate	31–43
(a) Court decisions show that there has been no "such custom and practice."	33–35
(b) Evidence of record, of many kinds, sharply disproves the existence of any such general "custom and usage"	36–43
2. The Commission's orders were within its authority under the act	43–63
3. The findings made by the Commission in each case are sufficient to support the respective order	63–68
4. The orders are supported by substantial evidence	68–73

Page

AMERICAN SHEET & TIN PLATE COMPANY CASE.. 73–79
ALLEGHENY STEEL COMPANY CASE..... 79–85
PITTSBURGH PLATE GLASS COMPANY CASE..... 85–92
WEIRTON STEEL COMPANY CASE..... 93–100
WEST LEECHBURG STEEL COMPANY CASE..... 100–106
PITTSBURGH PLATE GLASS COMPANY CASE..... 107–117

CONCLUSION..... 118
APPENDIX..... 119

CASES CITED

American Exp. Co. v. *Caldwell*, 244 U. S. 617..... 8
American Sheet & Tin Plate Co. v. *U. S.*, *15 F. Supp. 711*..... 2
Assigned Car Cases, 274 U. S. 564..... 70
Asso. Jobbers of Los Angeles v. *S. F. Ry.*, 18 I. C. C. 310..... 41
Atchison Ry. Co. v. *U. S.*, 295 U. S. 193..... 22, 27, 32, 66
Car Spotting Case, 34 I. C. C. 609..... 54, 55, 56
C. R. Co. of N. J. v. *U. S.*, 229 Fed. 501..... 63
C. & O. Ry. v. *Westinghouse, Church, Kerr & Co.*, 270 U. S. 260 53, 56, 61
Chicago & Alton v. *Kirby*, 225 U. S. 155..... 53, 62
C. & A. R. Co. v. *U. S.*, 156 Fed. 558..... 34, 51, 63
Crane Iron Works Case, 17 I. C. C. 514, 209 Fed. 238..... 34
Erie R. Co. v. *U. S.*, 280 U. S. 98..... 57
Ex Parte 104, 209 I. C. C. 11..... 2
Pinkbine Lbr. Co. v. *Gulf & S. I. R. Co.*, 269 Fed. 933, 255 U. S. 574..... 48
Gallagher v. *Pennsylvania R. Co.*, 160 I. C. C. 563..... 63
General Electric Co. Case, 14 I. C. C. 237, 243 U. S. 636, 114 N. E. 115..... 34, 35, 50, 56, 72, 83, 91, 98, 117
Georgia Comm. v. *United States*, 283 U. S. 765..... 8
Interstate Commerce Commission v. *B. & O. R. R. Co.*, 225 U. S. 326..... 63
Int. Com. Comm. v. *L. & N. R. R. Co.*, 227 U. S. 88..... 70
Koppers Gas & Coke Co. v. *U. S.*, 11 F. Supp. 467..... 66
Lehigh Valley R. R. Co. v. *U. S.*, 243 U. S. 444..... 73
Los Angeles Switching Case, 234 U. S. 294... 22, 27, 28, 32, 33, 34, 36, 41, 49, 55, 64, 71, 91, 99, 106, 117
L. & N. R. Co. v. *Motley*, 219 U. S. 467..... 53
L. & N. R. R. Co. v. *U. S.*, 282 U. S. 740..... 22, 28, 45, 57, 58, 72
Manufacturers' Ry. Co. v. *U. S.*, 246 U. S. 457..... 27, 65
Mississippi Valley Barge Co. v. *U. S.*, 292 U. S. 282..... 27, 65, 67
Mitchell Coal Co. v. *P. R. R. Co.*, 230 U. S. 247..... 63
N. Y. Cent. & H. R. Co. v. *General Elec. Co.*, 114 N. E. 115, 243 U. S. 636..... 21
Pittsburgh Plate Glass Co. v. *Director Gen.*, 58 I. C. C. 81..... 88
Private Car Case, 155 I. C. C. 775, 282 U. S. 740.. 22, 28, 45, 57–58, 72
Second Industrial Railways Case, 34 I. C. C. 596..... 55

Page

Solvay Process Case, 14 I. C. C. 237 ..... 34, 50
Southern Cotton Oil Co. v. *Cent. of Ga. Ry.*, 288 Fed. 335 49
Southern Ry. v. *Reid*, 222 U. S. 424 53
Standard Oil Co. v. *U. S.*, 283 U. S. 235 ..... 22, 45, 57
Tap Line Cases, 23 I. C. C. 277, 31 I. C. C. 490, 234 U. S. 1 35
Terminal Warehouse Co. v. *P. R. R. et al.*, 297 U. S. 500 61
United States v. *B. & O. R. Co.*, 293 U. S. 454 68
United States v. *Louisiana*, 290 U. S. 70 ..... 27, 65
U. S. Cast Iron etc. Co. v. *Dir. Gen.*, 57 I. C. C. 677 48
Virginian Ry. Co. v. *U. S.*, 272 U. S. 658 70
Warehouse Co. v. *U. S.*, 283 U. S. 501 21,
22, 25, 27, 28, 46, 47, 57, 59, 62, 70, 91, 99, 106, 117

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 734

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMERICAN SHEET & TIN PLATE COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEIRTON STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEST LEECHBURG STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 530) is reported in *American Sheet & Tin Plate Co.* v. *United States, and five other cases* (consolidated for hearing), 15 F. Supp. 711.

The general report of the Commission (R. 10), announcing certain governing principles, is reported in *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues Or Expenses, Part II, Terminal Services,* 209 I. C. C. 11. The supplemental reports, in connection with which were entered the orders involved in the consolidated cases, are reported in *American Sheet and Tin Plate Company Terminal Allowance,* 209 I. C. C. 719 (R. 49); *Allegheny Steel Company Terminal Allowance,* 209 I. C. C. 273 (R. 66); *Pittsburgh Plate Glass Company Terminal Allowance,* 209 I. C. C. 467 (R. 83); *Weirton Steel Company Terminal Allowance,* 209 I. C. C. 445 (R. 100); *West Leechburg Steel Company Allowance,* 210 I. C. C. 213 (R. 116); *Pittsburgh Plate Glass Company Terminal Allowance,* 210 I. C. C. 527 (R. 129).

JURISDICTION

The final decrees of the District Court were entered July 29, 1936 (R. 554–558). Petition for appeal was filed September 25, 1936, and allowed the same day (R. 579). The jurisdiction of this court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220 (U. S. C., Title 28, Secs. 45 and 47a, Supp. III),

and Section 283 of the Judicial Code, as amended by Act of February 13, 1925 (c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). Probable jurisdiction found March 1, 1937.

QUESTIONS

Following a general investigation by the Commission into the practices of railroads (sometimes followed and sometimes not) of performing, as under the line-haul rate, the "spotting" of cars within industrial plants, or of paying allowances to industries doing the "spotting" with their own locomotives, the Commission issued a main report in which it announced the general "principles" as to operating circumstances and conditions within a plant to be applied in determining whether reasonable delivery, or receipt, of cars under the line-haul rates covers "spotting" service within the plant. Supplemental reports have been issued relating to the situations at particular plants, including the supplemental reports, here involved, which deal specifically with the circumstances and conditions shown of record to exist at the plants of the appellees in these cases. Cars consigned to or by appellees are delivered to and received from them by the railroads at interchange or "storage" tracks located upon or at the entrance to appellees' plants. With their own locomotives, appellees (except Weirton Steel Company) "spot" the cars between the interchange tracks and particular unloading and loading points *when and as needed* by their in-

dustrial operations and under other circumstances later to be described; and they are paid allowances for such "spotting" by the railroads. At the plant of the Weirton Steel Company, by locomotives specially assigned, the railroad performs the "spotting" free or without charge in additon to the line-haul rate. Based upon underlying findings as to circumstances and conditions at the several plants the Commission found substantially in all cases here involved that the interchange tracks constitute reasonably convenient points for delivery or receipt of cars; that the railroads' transportation services under the line-haul rates begin and end at the interchange tracks; and that it results that the railroads, by payment of the allowances or by performing the "spotting" provide appellees with a preferential service not accorded to shippers generally, and refund a portion of the rates in violation of section 6. Orders were entered in each case directing the railroad or railroads to cease and desist from the practices. The ultimate question is whether the lower court erred in holding that the Commission's orders were invalid. Subordinate questions bearing on the validity of the orders are:

1. Whether the Commission exceeded its statutory authority.

2. Whether it made the necessary findings of fact.

3. Whether its findings and orders were supported by substantial evidence.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from final decrees of the United States District Court for the Western District of Pennsylvania, sitting as a specially constituted three-judge court, permanently enjoining and setting aside the orders of the Commission above described.

Appellees are all corporations with offices and places of business located in the Western District of Pennsylvania.

Appellees all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other appellees are located respectively as follows: American Sheet & Tin Plate Company, Vandegrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Brackenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and The West Leechburg Steel Company at Leechburg, Pennsylvania. All of these plants are served by the Pennsylvania Railroad Company except the plant of the Pittsburgh Plate Glass Company lo-

cated at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis, San Francisco Railway Company.

THE COMMISSION PROCEEDING

The Commission proceeding, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, in which the six orders in controversy were issued, is Part II of an investigation instituted July 6, 1931, upon the Commission's own motion "into practices of carriers affecting operating revenues or expenses" which for convenience was divided into different parts. The Commission's investigation was undertaken under section 13 (2) of the Act, which, *inter alia*, empowers the Commission to institute proceedings on its own motion as to any matters concerning which a complaint is authorized, "or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." Section 12 (1) of the Act authorizes the Commission to inquire into the management of the business of the carriers, imposes upon it the duty to keep itself informed as to the manner and method in which the same is conducted, and provides that "the Commission is hereby authorized and required to execute and enforce the provisions of this Act." Part II of the proceeding related to the "spotting" of cars at industries, the Commission's "main" report (R.

10) specifying the matters covered as follows (R. 14):

> Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at such further hearings. The principal questions to be determined, as indicated in the later notices, are as follows:
>
> 1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform. This question relates to three distinct methods of rendering such services, including:
>
> Group A, where the industries perform these services and receive compensation therefor from respondent carriers.
>
> Group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers, and
>
> Group C, where respondent carriers perform the services at the special convenience of the industries.
>
> 2. Whether, in circumstances where such services are performed by the industries,

> any allowances made to the industries by connecting common carriers as compensation for such services, are lawful; also why, in similar circumstances, no allowances are made to other industries for performing such services.

Hearings were held at practically all the larger cities of the country, a record of about 18,000 pages of testimony and more than 500 exhibits being made. During the course of the hearings testimony and evidence describing and relating to the service of so-called "spotting" of cars involved on the tracks of particular plants was taken, including those of appellees herein, which enabled the Commission to reach determinations and deal by supplemental reports with the practices of the carriers at particular industries or plants.

The Commission's orders, involved in the respective suits, are to be read together with the reports which are made parts thereof. *Am. Exp. Co.* v. *Caldwell*, 244 U. S. 617, 627; *Georgia Comm.* v. *United States*, 283 U. S. 765, 771.

After concluding the hearings the Commission, on May 14, 1935, issued its first or "main" report (R. 10), in which it discussed generally the historical and legal aspects of "spotting" service and reviewed and discussed generally the facts disclosed in the record before it. Describing that service the report reads, in part (R. 14–16):

> The service rendered in placing cars on and removing them from team tracks

and private sidings is well known. It consists of the placing of cars at or their removal from a point on such tracks reasonably convenient to both the carrier and the shipper. A description of the service involved on tracks of individual industrial plants will be dealt with in subsequent reports, but in general it may be stated as follows: The industries heard on this record have systems of tracks within their plants which vary in extent from a few tracks aggregating only a few hundred feet in length, to extensive systems many miles in length. These industries are served in one of two ways, i. e., inbound and outbound cars are delivered or received by the carriers on interchange tracks which either compose an extensive yard or designated tracks from and to which interchange track the spotting service is performed by locomotives belonging to the industry served, for which service in many instances the industry receives an allowance from the carrier while in other instances such service is performed by the industry at its own expense; or by the other method the spotting service is performed by the carrier. In the majority of such instances the spotting is performed by the carrier at its convenience and without interruption or interference by the industry. In other instances cars are first placed by the carrier on interchange tracks from which they are subsequently moved by a carrier engine or engines assigned to the plant and

operating entirely under the direction of the industry and spotted when and as needed by the industry without charge in addition to the line-haul rate or switching charge otherwise applicable. At the latter group of industries the services are substantially the same as at the industries where the spotting service is performed by plant power. This report will principally deal with the class of industries to which an allowance is paid by the carrier as compensation for rendering service which it is urged is within the obligation of the carrier under the line-haul rate, and those to which the carriers assign power to perform the spotting service. * * *

Numerous other industries heard on this record use locomotives for the identical purposes and in the same manner, but receive no allowance therefor, * * * * * *.

The published tariffs generally establish switching limits at the various destination points. Delivery within those limits is paid for when rates are collected to those destinations. In some cases the switching limits are definitely defined by boundaries, and at others the industries included within the switching district are named. There is no dispute that delivery at the various industries is covered by the published rate. The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a

> solution for that problem. The limitation of place within which delivery is due will vary with varying conditions. All that we can safely say is that there must be such a delivery as is customary and reasonable.
> * * *
> * * * * * *
> The tariffs publishing the line-haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for "plant switching" or "spotting of cars at unloading point" to be performed at plant's convenience.

The payment of allowances by railroads to industries for performing "spotting" within their plants appears to have started in the eastern industrial sections and the instances thereof gradually became more numerous in that part of the country until about 1915. Their spread in Pennsylvania and Ohio was more rapid after the end of federal control of the railroads. In 1921, the first important allowance was granted in the Illinois-Indiana industrial region, and others rapidly followed extending into the part of the Mississippi Valley west of the river. Some allowances have been granted in the north-central and extreme northwest sections and at present the only sections of the country where allowances are not paid are New England, the Southeast and the ex-

treme Southwest.[1] While the practice of granting allowances is more prevalent in the eastern industrial sections than elsewhere, the carriers in those sections by no means grant allowances to, or perform "spotting" for, all industrial plants served by them. This is shown by exhibits introduced by them, which will later be discussed. Furthermore, rules promulgated by the Traffic Executive Association, eastern territory (Appendix A, Commission's "main" report, R. 45), to govern the granting and computation of "plant facility allowances" show recognition of decided limitations upon the carriers' obligations to perform "plant spotting" under the line-haul rate, or to assume the costs thereof. These rules are discussed in the Commission's "main" report (R. 33-35). Moreover, the opening paragraph of the rules (R. 45) states that: "In view of the conditions under which plant facility allowances have developed it was the concensus that such allowances should be limited to iron and steel industries. * * *"

The allowances paid by the railroads to the particular industries receiving them are published in tariffs (R. 5, 59, 76) in the nature of exceptions to

[1] Main Report, 209 I. C. C. 11, 33, 34. (R. 32-33.) Or. Tr., Vol. II, p. 11315; Vol. 9, p. 9477; Vol. II, p. 11349; Vol. 7, ex. C-22; Vol. 8, p. 8035; Vol. 7, p. 7137; Vol. 3 of exhs. ex-A-48, p. 155; Vol. 4 of exhs. ex-C-22, p. 297. Or. Tr., has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586.)

the line-haul rate tariff, the assumption being that the "plant spotting" is transportation service under the line-haul rate, for performance of which the industries are entitled to compensation under section 15 (13) of the Interstate Commerce Act.

The Commission entered no general order with its main report, but its report announced the general principles as to operating circumstances and conditions within a plant to be applied in determining whether reasonable delivery, or receipt, of cars under the line-haul rate covers "spotting" service within the plant. The standard laid down is what has long been termed the "equivalent of team track, or simple switching, delivery", but it should be noted that the Commission defines or specifies service that is to be regarded as in excess thereof, the text of its report reading (R. 43):

> When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9, and 10 of Appendix A, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team track delivery.
>
> * * *

Following its main report, the Commission issued supplemental reports with respect to the situation at particular plants, including the above-named supplemental reports involved herein. Later chapters of this brief will discuss separately each of the supplemental reports and supporting evidence involved in the respective cases. For the purpose of this preliminary statement the supplemental report in Allegheny Steel Co. Terminal Allowance, 209 I. C. C. 273 (R. 66) may be used as generally illustrative of the situation shown in all of the supplemental reports involved in these cases. It is shown in that report that the Allegheny Company has approximately 150 industrial tracks and sidings with an aggregate length of about 10 miles within its 100-acre plant, owns 7 locomotives, of which 5 are in regular operation; that there are 11 important points where cars are spotted for loading and unloading, also 3 scrap yards and 5 additional locations where cars are loaded and unloaded by locomotive cranes. The supplemental report further states that a necessary part of the industrial operations is the weighing of cars when loaded and also when empty and that this weighing and other industrial operations would prevent the performance of the spotting service within the plant by the line-haul carrier in an uninterrupted movement at the carrier's convenience. A witness for the Allegheny Company testified that any switching by the carrier within

the plant would necessarily have to be performed at the convenience of the industry; that the placement of cars as and when needed by the industry would be required. In other words, as said in the report "switching service rendered at respondent's convenience might delay manufacturing activities and it appears that the plant cannot be operated satisfactorily unless switching power is constantly available." From testimony of the railroad, it appears also that the tracks within the plant would not accommodate switching locomotives of the type used in that locality, and that in order to perform the industrial spotting over the tracks provided by the industry, the carrier would have to bring in smaller locomotives from some other portion of the system and assign them to the exclusive use of this particular plant.

The conclusions reached by the Commission in all six supplemental reports are substantially the same, and those contained in the report of the Allegheny Steel Company case may be used as illustrative, as follows:

> Satisfactory spotting service at this industrial plant necessitates many switching movements daily between the interchange tracks and the points of loading and unloading. It is apparent that the switching service performed in spotting cars greatly exceeds ordinary team-track or simple switching delivery and is in excess of that which may be lawfully required of respondent under its

line-haul rates. Terminal Allowance to St. Louis Coke & Iron Co., 85 I. C. C. 591, 600.

We find that the existing line-haul rates of the Pennsylvania Railroad must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; that the transportation services which it is the duty of the carriers to perform for the steel company begin and end at the interchange tracks, and that the switching movements by the steel company between such interchange tracks and points within its plant are plant services which it is not the duty of the respondent carrier to perform under its line-haul rates.

We further find that by the payment of an allowance for the service performed on interstate shipments beyond the interchange tracks described of record, the respondent carrier provides a means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the Act.

An appropriate order will be entered.

The orders entered in the six cases are similar, and the following one is typical:

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The

Pennsylvania Railroad Company to the Allegheny Steel Company for performance by the latter of spotting service within its industrial plant at Brackenridge, Pa., and the Commission having under date of May 14, 1935, made and filed a report, Propriety of Operating Practices—Terminal Services, 209 I. C. C. * * *, containing its legal conclusions with respect to the general situation presented and the division having on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the Allegheny Steel Company, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance The Pennsylvania Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 1, 1935, and thereafter to abstain from such unlawful practice.

PROCEEDINGS IN COURT BELOW

July 25, 1935, the petitions were filed in the court below in causes numbered 3110, 3111, 3112 and 3113 (R. 10; 52, 70, 87). July 31, 1935, interlocutory injunctions were entered restraining enforcement of the Commission's orders involved in said causes. (R. 191–194.) August 31, 1935, and October 8,

1935, the petitions were filed respectively in causes numbered 3130 and 3136 (R. 104; 120). September 12, 1935, and October 22, 1935, interlocutory injunctions were entered respectively in said two causes (R. 194–197). October 22, 1935, all six causes were consolidated for hearing and were orally argued by counsel (R. 513.) The consolidated cases were submitted upon the petitions, to each of which was attached the Commission's main report and its supplemental report involved in the particular case, upon the answers of the United States and of the Commission, and upon a certified copy of the record made before the Commission (R. 514–515). May 23, 1936, the court rendered its opinion, holding that the Commission's orders in all of the cases were invalid (R. 531–535). July 29, 1936, the Court filed its Findings of Fact and Conclusions of Law (R. 571–573), and on the same day entered final decrees permanently enjoining the Commission's orders (R. 574–577).

SPECIFICATIONS OF ERRORS

The following errors of the District Court are urged herein.

1. In entering the decrees enjoining, setting aside, and annuling the orders of the Interstate Commerce Commission.

2. In holding that the switching and "spotting" of cars within the respective industrial plants of the plaintiffs is "transportation" within the

meaning of Section 1 (3) of the Interstate Commerce Act.

3. In holding as follows: "By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right-of-way, and also on private industrial tracks off the carriers' right-of-way and on the private property of the industries served. Such services are included in the established rates, unless in express terms the published tariffs otherwise provide."

4. In holding that " 'spotting services' are recognized in law as common-carrier services to which the shippers are entitled, and which the carriers are in duty bound to perform."

5. In holding that in these cases there are "no circumstances which would relieve the carriers involved from the duty of 'spotting' the cars as a part of the transportation imposed upon them by law."

6. In holding that the "spotting" of cars within the industrial plants of the plaintiffs "is covered by the railroads' published tariffs, and is a part of the line-haul freight charge, and that where the plaintiffs do this 'spotting service' themselves they are entitled to the compensation provided for in the published freight tariffs."

7. In holding that the Commission's orders in these cases are not based on jurisdictional findings necessary to support them and that the injunctions sought should be granted in all these cases.

8. In holding that "the Commission was without power to prohibit entirely allowances for doing 'spotting service.'"

9. In holding that the Commission had power only to "review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful", and in holding that the Commission failed to make findings sufficient to support its orders.

10. In holding that the orders of the Commission in these cases are beyond its statutory power, and that the injunctions prayed for should issue.

11. In accepting and adopting the findings of fact and conclusions of law suggested by the plaintiffs, and in failing to sustain defendants' objections thereto, and in refusing the findings and conclusions suggested by the defendants; and the court particularly erred in entering its findings numbered "3", "4", "5", "6", "7", and "9", and in finding as facts the matters and things therein stated.

12. In the several conclusions of law which it entered, and in each of said conclusions.

13. In failing and refusing to hold that the Commission's orders in these cases are within the power conferred upon it by the Interstate Commerce Act.

14. In failing and refusing to hold that the findings made by the Commission in each of these cases are sufficient to support the respective orders.

15. In failing and refusing to hold that each of the orders in these cases is supported by substantial evidence.

16. In failing and refusing to dismiss the petition in each of these cases for want of equity.

SUMMARY OF THE ARGUMENT

I. The orders in these cases, requiring the specified railroads to cease the performance of "spotting" cars within the plants of appellees without charge in addition to line-haul rates or payment of allowances to appellees for performing their own "spotting", were within the Commission's authority under the Interstate Commerce Act. Where work done by the shipper is in fact a part of the transportation service under the line-haul rates, the Government does not, of course, dispute that an allowance out of the rates is due the shipper (Sec. 15 (13)). But no allowance is due for service rendered by the shipper, and no additional service may be rendered by the carriers free, after delivery has been made and transportation has ended or before it has in fact begun. *New York Central & H. R. Co.* v. *General Electric Co.*, 114 N. E. 115, 117 (cert. den. 243 U. S. 636); *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501. In each of these cases the Commission has found and determined, after hearing and upon evidence, what constitutes complete delivery or where transportation begins and ends; that the

transportation services which the carriers are obligated to perform at these plants under tariffs publishing their line-haul rates but not specifying the precise point where cars will be received or placed within a terminal area, begin and end at the interchange tracks; that the service beyond is plant service, and that, accordingly, the allowances provide the means by which appellees receive preferential service not accorded to shippers generally, and constitute unlawful refunds of a portion of the line-haul rates.

The determination of what constitutes delivery or where transportation begins and ends is one of fact, primarily within the province of the Commission, to be made upon evidence disclosing "the actual conditions of operation." *Los Angeles Switching Case*, 234 U. S. 294, 311; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *L. & N. R. R. Co.* v. *United States*, 282 U. S. 740, 757; *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240.

(1) The court below erred in holding that the carriers are obligated to pay the allowances or perform the spotting because of an asserted general custom and practice of railroads in delivering and receiving cars on private industrial tracks and the absence of any circumstances in the instant cases which would relieve them from such duty. It has never been, and is not now, general railroad custom

and practice to treat the "spotting" service here involved as included in the transportation obligation under the line-haul rate: (a) Court decisions, cited herein, show that there has been no such custom and practice, and that cases of an interior movement of plant traffic and of deliveries through a system of interior switching tracks constructed as plant facilities have been consistently distinguished by both the courts and the Commission from ordinary private side-track deliveries. (b) Evidence of record of many kinds sharply disproves the existence of any such general custom and usage, and shows, instead, that there has developed among many carriers a practice, more prevalent in some regions than in others, of paying allowances to or performing plant spotting for some industries, and of not paying allowances to or performing plant spotting services for other industries. The Commission's report points out, and appellees do not deny, that throughout the Southeast the carriers pay no allowances and perform no plant spotting; that no allowances are paid in the extreme Southwest, and that the New England carriers maintain that allowances are improper and that where industries specify tracks on which cars are to be interchanged the placing or receiving of cars at such tracks constitute delivery or receipt by the carrier under line-haul rates (R. 32–33). While the practice is more prevalent in the Eastern industrial section the carriers in that section by no

means either grant allowances to or perform spotting for all industrial plants served by them. For example, the evidence of the Pennsylvania Railroad shows 125 industries on its lines which perform their own spotting without allowances, 59 industries which receive allowances for performing their own spotting, 18 industries where the spotting is performed in part by the railroad and in part by the industry without an allowance, and 833 industries (having two or more tracks) at which the railroad does the spotting. The record is replete with evidence of many other railroads showing similar facts with respect to the payment or nonpayment of allowances to industries on their lines. As late as 1920 a special committee of railroads operating in official territory (East of the Mississippi River and North of the Ohio River) reported that practices among those carriers with respect to plant spotting services were irregular and inconsistent and demanded a remedy; and in 1929, a committee of eastern carriers sought, unsuccessfully, to promulgate general rules for the very purpose of establishing uniform custom and practice in the matter of performing plant spotting or paying allowances therefor.

(2) The district court erred in holding that the Commission was "without power to prohibit entirely allowances for doing 'spotting service'", and that it exceeded its power in issuing the orders. Section 15-(1) of the Act expressly authorizes the

Commission to issue a cease and desist order whenever, after hearing upon complaint or its own motion, it finds a rate or practice to be unreasonable, unjustly discriminatory or unduly preferential, "or otherwise in violation of any of the provisions of this Act." Section 13 (2) empowers the Commission "to make and enforce any order" in any case and "as to any matter or thing concerning which a complaint is authorized to be made * * *, or concerning which any question may arise under any of the provisions of this Act." Section 15 (13) provides for an allowance *if* the shipper renders any transportation service in connection with his shipment, and authorizes the Commission to fix the amount of the allowance "by appropriate order." It is obvious that such allowance is a matter or thing concerning which a complaint is authorized to be made; that payments under the guise of an "allowance" for services which are not included in the carrier's obligation under its rates constitute plain "refunds" of a portion of the tariff rates in violation of Section 6 (7) as found by the Commission in these cases, and violations of other provisions of the Act, as in *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 513, where such allowances were held to be "rebates forbidden by secs. 2 and 3 of the Interstate Commerce Act", and thus a proper matter for a cease and desist order by the Commission. The lower court's denial of the Commis-

sion's power to prohibit allowances entirely upon a finding that the service for which they are paid is not in fact a transportation service under its line-haul rates, ignores the provision of Section 15 (1) authorizing the issuance of orders where the Commission finds a rate or practice to be "otherwise in violation of any of the provisions of this Act", and is contrary to decisions of the courts and the Commission cited in this brief.

II. The findings made by the Commission in each case are sufficient to support the respective orders. The supplemental report in each case finds and sets forth all pertinent facts concerning the physical plan and arrangement of the particular plant, the plant tracks, the railroad tracks and spurs, and the circumstances and conditions under which the spotting service is and must be performed. From these facts the Commission finds substantially in all of the cases that the interchange tracks constitute reasonably convenient points for delivery or receipt of shipments; that the carriers' transportation services under the line-haul rates begin and end on the interchange tracks, that the service beyond is a plant service, and that accordingly the carriers may not lawfully perform the service or pay allowances to appellees for performing it, that the allowances provide the means whereby appellees enjoy preferential service not accorded shippers generally, and constitute refunds in violation of Section 6 of the Act. These

findings are clearly sufficient to meet the requirements of the Act (Section 14) and of the applicable decisions of this Court. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *United States* v. *Louisiana*, 290 U. S. 70; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282; *A., T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193. Compare *Merchants Warehouse Co.* v. *United States, supra*, and *Los Angeles Switching Case, supra.*

III. The orders are supported by substantial evidence. The evidence abundantly establishes all of the facts found and recited in the supplemental reports; it furnishes a precise description of appellees' plants; it fully describes the work of the railroads in delivering and receiving cars upon the interchange tracks and the "spotting" service performed at each of the plants; it shows the conditions under which the spotting service is and must be performed because of the nature and requirements of appellees' manufacturing operations, and it describes the physical and other obstacles and conditions within the plants which prevent the carriers from performing the service at all, or at their own reasonable convenience. Appellees' contention really is that the Commission drew improper conclusions from the evidence which the record does contain, and not that the evidence contains insufficient facts to justify the Commission in reaching its conclusions. The evidence in these cases is of

similar type and probative effect to that held sufficient to support the orders in *Merchants Warehouse Co.* v. *United States, supra,* and *L. & N. R. R. Co.* v. *United States,* 282 U. S. 740, 757–758, and is clearly sufficient to support the orders under the rule laid down by this Court in *Los Angeles Switching Case, supra,* where it said that (p. 311) questions of the type here involved are "to be determined according to the actual conditions of operation."

ARGUMENT

INTRODUCTORY

Where work done by the shipper is in fact part of the transportation service under the line-haul rates the Commission does not, of course, dispute that an allowance out of the rates is due the shipper (Sec. 15 (13)).[2] But in these cases the only assumption that could support the allowances out of the rates is that the carriers, after making placement of the cars on interchange tracks at or within the plant, are still obligated by their rates to place special locomotives and crews at the "beck and call" of the industries, the locomotives often of a design and size different from those used in the vicinity and with the crews working to distribute cars at such times and to such points as is desired and as will not interfere with other activities of the plants. What the Commission found

[2] Appendix I, pertinent statutory provisions.

was that, under these circumstances and others, placement of the cars upon, or taking them from, the interchange tracks within or at the plant, constituted under the rates delivery, or receipt, of the shipments at a reasonably convenient point; that the transportation services which the carriers are obligated to perform begin and end at the interchange tracks; and that, accordingly, the allowances from the rates are not for transportation services which the carriers are obligated to perform thereunder, but provide the means by which appellees receive preferential service not accorded to shippers generally or a refund of a portion of the line-haul rates.

In contrast, the decision of the court below is, in substance, that the service in question is part of the carriers' transportation obligations under the line-haul rates (R. 535) and, accordingly, since appellees are doing it with their own plant railways, the allowances made to them out of the rates are paid as compensation for doing work which is made the railroads' obligation by the rates.

We do not understand the court below to mean that the line-haul rates *in terms* provide for such service to or from the precise unloading or loading "spots",[3] to be performed as a "stand-by" service

[3] Appellees' petitions made no such contentions, but concede that the line-haul rates do not state "the precise spot in such city, town, or station locality, at which they undertake to receive or deliver freight." (R. 55; 72; 90; 107; 122.)

when and as meeting the plants' activities. The obligation arises, so it is concluded, because "spotting service" is "transportation" within the definition of section 1 (3) of the Act and is, therefore, a common carrier service "up to certain limits", because of the long continued custom and practice of making such placements both on the carriers' terminal tracks and also on private industrial tracks on the private property of industries served, and because the line-haul tariffs do not in *express terms* exclude such services. (R. 534.) The decision states that there is no exact formula that can be applied; that the limits of place within which delivery is due will vary with varying conditions; and that such delivery is required as is customary and reasonable (R. 534). And the decision specifies certain typical circumstances that would relieve the carrier from the duty of "spotting" cars (R. 534). But "in the instant case", the court finds, there are "no circumstances which would relieve the carriers involved from" such duty. (R. 535.)

The court also held that the Commission was without power to prohibit entirely the allowances to appellees for doing their own spotting service; that, since the Commission had not found that the allowances were unreasonable, unjustly preferential, unduly discriminatory or otherwise unlawful, the orders were void (R. 535).

I

The orders issued by the Commission in these cases, requiring the specified railroads to cease the performance of "spotting" cars within the plants of appellees without charge in addition to line-haul rates, or payment of allowances to appellees for performing their own "spotting", were within its authority under the Interstate Commerce Act

1. It has never been, and is not now, general railroad custom and practice to treat the "spotting" service here involved as included in the transportation obligation under the line-haul rate

As above shown, the court below, relying upon the definition of "transportation" in section 1 (3) of the Act and upon what it stated to be "the long continued custom and practice", concluded that the "spotting services" between interchange or storage tracks and unloading and loading points within the plants of appellees were included in the carriers' obligations under their line-haul rates, except under certain special circumstances, typical examples of which are set forth in the court's opinion. (R. 534, 535.) And the court found that, in the instant cases, there were no circumstances which would relieve the carriers of such obligation. Earlier in its opinion the court had said there was no exact formula that could be applied and that the decided cases showed that the limits of place within which delivery is due will vary with varying conditions and that such delivery is required as is customary and reasonable. (R. 534.)

Plainly the answer to the question is one of fact and the provisions of the Interstate Commerce Act,

both express and implied show that it is, primarily, within the province of the Commission to determine what terminal services are included in the line-haul rate according to the actual conditions of operation. Compare *Los Angeles Switching Case*, 234, U. S. 294, 311. It is the duty of the Commission to find what constitutes complete delivery or where transportation ends. *Atchison Ry.* v. *United States*, 295 U. S. 193, 201.

The mere assertion, as made by appellees, in the court below, of a long continued general custom to include "plant spotting" in the line-haul rate does not establish such general custom. A long continued general custom has to be established by facts and when the facts show that the alleged general custom is simply a practice (and even that not followed by all railroads or in all sections of the country) of performing such service for, or granting allowances to, particular patron industries and not to others, the question had to be answered just as it was answered by the Commission in these cases, namely, by the ascertainment as to what constituted reasonably convenient points for delivery and receipt of shipments, under the actual circumstances and conditions of operation confronting the carriers.

The Commission found that the railroads had not withheld the handling of cars to agreed interchange tracks and that such tracks correspond to the spurs or sidings on which spotting had its

origin; but as to the spotting service beyond, consisting of the distribution of the cars to meet the needs of the plants, it found that the uncontroverted facts showed that such form of delivery was not "customary." (R. 16.)

(a) Court decisions show that there has been no "such custom and practice"

The *Los Angeles Switching Case*, 234 U. S. 294, involved an order of the Commission requiring carriers serving Los Angeles to desist from making a charge in addition to the line-haul rate for deliveries to industries located on spurs, or sidings, within the boundaries of the Los Angeles switching district. The Commission had found that the spurs, or sidings were in a real sense portions of the terminals of the carriers (p. 307); that spur-track delivery is a substitute service and not supplemental to any other delivery (p. 308); that carriers throughout the country customarily so "treat industry spurs of the kind here in question," the only exceptions being, apparently at the cities of Los Angeles, San Francisco and San Diego (p. 311). The thing of immediate importance in that decision is that the Court, in upholding the Commission's order, twice mentioned (pp. 307, 310) that the Commission in making its ruling had expressly distinguished:

> Cases of an interior movement of plant traffic to and from various parts of the establishment and of deliveries through a

> system of interior switching tracks constructed as plant facilities. * * *

See *General Electric Case*, 14 I. C. C. 237; *Solvay Process Case*, 14 I. C. C. 237; *Crane Iron Works Case*, 17 I. C. C. 514, 209 Fed. 238, 242; *C. & A. R. Co. v. U. S.*, 156 Fed. 558. In the *General Electric Case* (N. Y. Ct. of Appeals), 114 N. E. 115, the decision, after citing the above cases, reads, pp. 118, 119:

> In the Industrial Railway Cases (29 I. C. C. 212, 230; 34 I. C. C. 596, 601) the Commission reaffirmed its previous rulings, and pointed out (29 I. C. C. 235) that they were in harmony with the prevailing practice in England and in Germany. See, also, Karl Lumber Co. v. C. of G. Ry. Co., 20 I. C. C. 450, 455; Mfrs. Ry. Co. v. St. L. M. & S. Ry. Co., 21 I. C. C. 304, 315 * * *. We find the same distinction between plant facilities and true agencies of transportation in the decisions of the Supreme Court. Sometimes the application of the distinction by the Commission has been disapproved, but always the validity of the distinction has been assumed, and the General Electric and Solvay Process Cases have been cited to illustrate its meaning. This was done in the Tap Line Cases, 234 U. S. 1, 23 * *. Day, J., writing for the court, explained the meaning of plant facilities by reference to the General Electric and Solvay Process Cases, and, commenting on them said:

"These systems of internal trackage were not common carriers, and, however extensive, were intended to and did furnish service for the plants which owned and operated them."

See, also, opinion of the Commerce Court in that case (Louisiana & R. Ry. Co. v. U. S., 209 Fed. 244, 257). Again, in the Los Angeles Switching Case, 234 U. S. 294, 310, 34 Sup. Ct. 814, 818, (58 L. Ed. 1319), Hughes, J., writing for the Court, said that the receipt and delivery of goods at plants located upon spurs or side tracks was sometimes a distinct service; and distinguished from the case before him, "cases of an interior movement of plant traffic to and from various parts of the establishment, and of deliveries through a system of interior switching tracks constructed as plant facilities."

Study of the *General Electric Case, supra,* will show that the opinion makes accurate analysis of court decisions, which are still leading cases on the subject matter; that it gives true effect to the *Tap Line Cases,* 234 U. S. 1[1] as applicable here, and precisely follows the principles running through the decision in the *Los Angeles Switching Case, supra.*

---

[1] In the *Tap Line Case* the Commission orders were not upheld, the decision being governed, however, by the fact that the industrial railways involved were common carriers incorporated and holding themselves out as such and in fact doing business for the public.

(b) Evidence of record, of many kinds, sharply disproves the existence of any such general "custom and usage"

Aside from what is disclosed in court decisions, the record shows that there has in fact been no custom and usage of making "deliveries through a system of interior switching tracks constructed as plant facilities." *Los Angeles Case,* p. 310. There has been a practice, more prevalent in some regions than in others, of making such deliveries (plant spotting) for some industries, or of paying allowances, and of not doing such plant spotting for other industries or paying them allowances. A brief statement of the start of the practice of paying allowances for "plant spotting" and its spread to certain sections of the country has been given in the opening statement. One thing that is apparent is that the practice, once started as to a particular industry rapidly spreads to others.[5] But, while the practice is followed in considerable measure in the eastern industrial section, the carriers in that section by no means either grant allowances to, or perform the "spotting" for, all industrial plants served by them.

As illustrative of the situation, we refer to Ex. 150 (Or. Tr., Vol. I of Exhibits, pp. 460–477) introduced by the Pennsylvania Railroad which shows in particularly compact form the situation on that road in respect of spotting service. Mr. Orcutt, counsel for the Pennsylvania, referring to

---

[5] Ex. A–48, p. 155, Vol. 3 of Exhibits of the Original Transcript; Ex. C–22, p. 297, Vol. 4 of Exhs., Or. Tr.

that exhibit said (Or. Tr., Testimony, Vol. 3, p. 2057):

> Mr. Director, I have distributed and have given to you a statement containing the industries located on the Pennsylvania Railroad, separated as between the common carriers, the industries performing their own service for an allowance, those performing the very service and receiving none, those where the railroad performs the service, and those where the industry performs part of the service and the railroad likewise a part. * * *

The exhibit referred to lists, in column 2–c, 833 industries which have systems of tracks, and for which the railroad does the spotting. It should be noted that for purpose of the compilation any industry having *two or more tracks is an industry having a system of tracks,* although industries having a single siding are not included. (Vol. 3, p. 2062.) The exhibit lists, in column 2–a, 59 industries which perform their own spotting and are paid allowances by the railroad; it lists, in column 2–b, *125 industries* which perform their own spotting without allowances from the railroad; and it lists 18 industries where the spotting is performed in part by the railroad and in part by the industry, the latter receiving no allowance. (Vol. 3, p. 2058.)

The Pennsylvania's Exhibit 153 (Or. Tr., Vol. I, Exhibits 519, listing plant facility allowances paid

by that railroad) shows only 1 such allowance paid in Michigan, 3 in Illinois, and 7 in Indiana.

Concerning certain other railroads whose lines serve both the eastern industrial regions and the Chicago District: In exhibits, showing inter alia what industries on their lines did their own spotting without being paid allowances, the Erie named two industries on one division, four industries on another divison, four other industries on still another division and four other industries on other lines (Exs. 82, 83, 84, 158, Vol. I of Exhibits);[6] the Baltimore & Ohio named in Ex. 115 (Vol. I of Exhibits) more than 20 well-known industries, in Ex. 122 (Vol. I of Exhibits) eight industries in Ohio and Western Pennsylvania, in Ex. 125 (Vol. I of Exhibits) 11 industries in Pennsylvania and West Virginia; the Detroit & Toledo Shore Line named three industries (Ex. 167, Vol. I of Exhibits); and the Michigan Central named 14 industries (Ex. 174, Vol. I of Exhibits). The Baltimore & Ohio Chicago Terminal Railroad lists 5 industries on its line which receive allowances for doing their own spotting and 2 which do their own spotting without an allowance. (Exhibit 245, Vol. I, Exs. pp. 150–151.) The Baltimore & Ohio Railroad lists (Ex. 243, Vol. II, Exs. p. 123) for its Toledo division, no industry doing spotting for an allowance, and 4 industries doing their own spot-

[6] All record references in this paragraph are to the Original Transcript.

ting without allowances; for its Newark (Ohio) division, no spotting for allowances, and 2 industries spotting without allowances (pp. 134–135); for its Cincinnati terminal district (Ex. 239, Vol. II, Exs. p. 89) 2 industries which receive allowances for spotting, and 5 which do their own spotting without allowances. The Chicago, Milwaukee, St. Paul & Pacific Railroad shows 42 industries on its lines which perform their own spotting without an allowance and 12 industries which receive allowances for spotting (R. 3877, Ex. 263, Vol. II, Exs. pp. 222–223). The Chicago, Rock Island & Pacific Railway shows 4 industries receiving allowances for spotting and 5 which spot their own cars *without* allowances (Ex. 281, Vol. II, Exs. pp. 394–399, 400–407). The Chicago & North Western Railway shows 36 industries which perform all or part of their own car-spotting, and of these, 7 receive allowances and 31 receive *none*. (Of these 31, "steam power" is used by 21, and electric or gas engines by the others, one of which uses "narrow gauge" power.) (Ex. 268, Vol. II, Exs. p. 290.)

In this connection, too, mention is made of the rules promulgated by the carriers' committees to govern the making of allowances. These rules are attached to the Commission's main report, Appendix A,[7] and they are discussed at some length in

[7] Or. Tr., Vol. I of Exh's., Ex. 106, p. 297; Vol. II of Exh's., Ex. 264, p. 251.

the report itself. (R. 33–35.) As there said, in substance, the rules show a marked attempt by the carriers to separate the services for which they are obligated. Rules 3 (c), 9 and 10, sec. 18 (R. 46, 48). Also, the opening paragraph of the rules states that, in view of the conditions under which "plant facility allowances have developed it was the consensus (a) that such allowances should be limited to iron and steel industries * * *." True, the cases before this court (and others) show that allowances have not been limited to iron and steel industries; but they and the rule just quoted show lack of custom or uniform treatment of shippers in the matter of allowances.

The correspondence and memoranda embodied in this record as Ex. C–139,* Witness Julius Eysmans, Vice President of the Pennsylvania Railroad, are particularly informative with respect to the efforts made on the part of carriers in Official Classification territory to adopt a uniform policy which would settle the question as to the extent of service which the carriers should perform under the line-haul rates. This exhibit is referred to in the Commission's main report (R. 17, 18) and supports what is there said that:

> About 1920 a special committee of carriers operating in official territory made a study of the practices in that territory with respect

* Or. Fr., Vol. V of Exhs., p. 115, Vol. 10 of Tes., p. 9988.

> to the spotting service. This special committee reported that the practices were irregular and inconsistent and demanded a remedy. * * * It recognized that much of the service for which allowances were paid was service which was in excess of the carriers' obligations under their line-haul rates and proposed that a tariff be issued for account of the carriers in that territory. * * *
>
> The proposed tariff provided that where spotting service could not be performed on private or industrial sidings by means of one simple switching movement, a uniform charge should be applied for the remainder of the service; and that where an industry performed spotting service which was properly a carrier's duty, an allowance in an amount uniform to all such industries might be paid.
>
> Due mainly to the opposition of the National Industrial Traffic League, the proposed tariff was never published. This record shows that the irregularities, inconsistencies, and demand for remedial measures, which were found by the special committee to exist, still exist, and have since been greatly multiplied.

In *Ass. Jobbers of Los Angeles* v. *S. F. Ry. et al.*, 18 I. C. C. 310, cited by appellees in the court below as authority for the asserted "custom and usage" and which is the case that was upheld in the above-mentioned *Los Angeles Switching case,*

234 U. S. 294, the Commission simply said, as appears by this court's decision at page 311:

> * * * It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question "as portions of their terminals, making no extra charge for service thereto when a carrier receives the benefit of the line haul out or in." It was added that while this general statement covered perhaps ten thousand cities and towns in the United States, the carriers before the Commission could name only three exceptions, to wit, the cities of Los Angeles, San Francisco, and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.
>
> Such a question is manifestly one upon which it is the province of the Commission to pass.

The industry spurs of the kind there in question were not "systems of interior switching tracks constructed as plant facilities" (p. 310); for, as already noted, this court's opinion said that the Commission had expressly distinguished cases of such

kind. Also of significance is the fact that this court preferred to lay "the generalization to one side" and to pass to the Commission's determination as based on actual operating conditions.

2. The Commission's orders were within its authority under the act

The court below held that the Commission was without statutory power to make the orders in these cases. The opinion reads (R. 535):

> As we view the law, the Commission was without power to prohibit entirely allowances for doing "spotting service". It could review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful: Section 15 (par. 1) and (13) of Interstate Commerce Act; * * * No such findings were made in the instant cases.

The rationale of this holding is not clear but it seems to be that the Commission's power to make orders affecting allowances must be found wholly within Section 15, and that, since that section does not expressly declare, in terms, that the Commission may issue orders prohibiting allowances for "spotting service", it is without power to do so. In any event, the court's holding is patently erroneous for it not only ignores the other sections of the Act, which, under the elementary principle of statutory interpretation, must be read and construed together with the provisions of Section 15,

but it also misconstrues that section. Considered alone, Section 15 plainly confers the power to make the orders in these cases. Paragraph (1) of that section provides that whenever, after hearing, upon complaint or upon its own motion, the Commission shall be of opinion that any rate, fare, or regulation, or practice whatsoever is or will be unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, "or otherwise in violation of any of the provisions of this Act", the Commission "is hereby authorized and empowered to determine and prescribe" the rate, fare, charge, regulation, or practice which is or will be just, fair and reasonable, to be thereafter followed, and "to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

Thus, the power conferred by Section 15 (1) to make orders extends to rates, practices, etc., which the Commission may find to be unreasonable, unjustly discriminatory or unduly preferential or prejudicial, and also, in terms, extends to and includes rates and practices which the Commission finds to be "otherwise in violation of any of the provisions of this Act." Certainly the Commission found that the carriers' practices were in violation of section 6 in that they provided appellees with a preferential service not accorded to shippers generally, or were refunds out of the rates. Certainly

the proceeding has demonstrated, more than any other, that, as to certain violations of that section, there is no rigidity of statutory rule, but that investigation and fact finding by the qualified administrative body into the circumstances and conditions of actual operation are necessary and are intended by the statute. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240; *L. & N. R. R.* v. *United States*, 282 U. S. 740, 752.

Section 15 (13), under which the right to allowances is claimed, and which is cited in the above quotation from the opinion below, provides that, *if* the owner of property transported renders any service connected with such transportation the charge or allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable maximum charge for such service "and fix the same by appropriate order." And, paragraph (14) of the same section provides that "the foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act."

Moreover, power to make the orders is obviously conferred by the more sweeping and comprehensive language of Section 13, under which the Commission's investigation was instituted. Paragraph (1) of that section authorizes a complaint to be made to the Commission concerning "anything

done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof", and paragraph (2) empowers the Commission "to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, * * * or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act", and, further, "to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had * * *."

Clearly, an allowance under Section 15 (13) to a shipper is a "matter or thing concerning which a complaint is authorized to be made * * * or concerning which any question may arise under any of the provisions of this Act." This is abundantly shown in the Commission's main report (R. 18–32) wherein it reviews numerous cases arising upon complaints filed with it by shippers, including some of the appellees in the cases at bar, who claimed allowances under Section 15 (13). Also, it is plain that payments under the guise of an "allowance" for a service which is not in fact a transportation service might, as in *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 510–511, 513, "amount to rebates forbidden by secs. 2 and 3 of the Interstate Commerce Act", and, thus, *ipso facto* unlawful and a proper matter for a cease and

desist order by the Commission, regardless of whether they resulted in undue prejudice or unjust discrimination.

And it is more apparent that such payments might, as here, be plain "refunds" of a portion of the tariff rates, which Section 6 (7) expressly prohibits regardless of the effect upon shippers who do not receive such payments.

The holding of the court below that the Commission is "without power to prohibit entirely allowances for doing 'spotting service'" denies power in the Commission to question whether allowances are *ipso facto* unlawful, whether they are paid under that guise for any transportation service at all, or whether a service rendered by a shipper is in fact a transportation service. Thus, the lower court opens wide to simple rebating the very door which the Act was designed to close.

The Court's holding is in the very teeth of this Court's decision in the *Merchants Warehouse Case, supra;* and it is also directly contrary to decisions of other courts and to the Commission's consistent interpretation of its power to make orders concerning allowances. Both the courts and the Commission have held that the provisions of Section 15 (13) itself gives the Commission power to determine not only what is a just and reasonable allowance but also whether under the facts of a particular case the payment of *any* allowance is lawful.

In *United States Cast Iron etc. Co.* v. *Director General*, 57 I. C. C. 677, a complaint under Section 15 (13), the Commission was asked by shipper to fix a reasonable allowance for spotting service, and the Commission said (pp. 683–684):

> * * * However, it is not satisfactorily established that the legal obligation of the defendant [railroad] goes to the extent of requiring it to spot the cars at the places of unloading or to take the cars from the places of loading within the plant. * * * Complainant's case is presented on the theory that the sole issue is the adequacy of the allowance voluntarily made by the defendant to cover the cost of the interchange switching and spotting service performed by complainant with its own power. But, as above shown, *the determination of that issue necessarily involves the question of whether the service for which the increased allowance is sought can fairly be regarded as a service substituted for the terminal service which the defendant is obligated to perform.* * * * [Emphasis ours.]

In *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933 (5th C. C. A.) (certiorari denied, 255 U. S. 574), a shipper sued a railroad for an allowance for switching services which it is claimed to have rendered pursuant to an agreement with the railroad. It had formerly made complaint to the Commission under Section 15 (13), and the Commission, after hearing, had dismissed the complaint upon the ground that it did not appear that the

railroad was under any obligation to perform the switching service involved. (See 48 I. C. C. 705–6.) The Court of Appeals said (p. 936):

> We are of opinion that the action of the Commission in dismissing that application amounted to a *ruling against* the asserted *right of the appellant to be compensated by the appellee for the services in question.* It is to be supposed that the Commission considered all the facts disclosed, including the agreement, if it was regarded as still in existence, and concluded that under all the circumstances appellant was not entitled to favorable action on its application. *The relief sought in this case could not be granted without denying effect to the action of the Commission in respect of a matter within its jurisdiction.* The legislative purpose in empowering the Commission to pass on charges and allowances for services of a shipper, or for his furnishing instrumentalities used in connection with transportation, including a review of agreements on those subjects, and to determine what, if any, allowance might be made therefor, would be defeated by recognizing a right of the courts to enforce such agreements, notwithstanding unfavorable action thereon by the Commission. [Emphasis ours.]

See also *Southern Cotton Oil Co.* v. *Central of Georgia Ry. Co.*, 228 Fed. 335–6.

The opinion of this Court in the *Los Angeles Switching Case* twice mentioned, with plain ap-

proval, the decisions in the *General Electric* and *Solvay Process cases* (14 I. C. C. 237, 246) in which the Commission had held that the spotting of cars by the plant railways of those companies was no part of the railroads obligations under the line-haul rate and had refused to approve allowances. The same general subject matter was later passed upon by the New York Court of Appeals in the *General Electric Case* (*supra*) 114 N. E. 115 (certiorari denied 243 U. S. 636), which decision has already been referred to and quoted from. Certain other portions of that decision are particularly pertinent here. At page 117 the opinion reads:

> Transportation includes delivery. Under the plaintiff's published tariffs it does not include the work of loading and unloading. Official Classification, 38, Interstate Commerce Commission. But whatever is essential in order to complete delivery the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; United States v. B. & O. R. R. Co., 231 U. S. 274, 293; 34 Sup. Ct. 75, 58 L. Ed. 218. *But no allowance is due for service rendered by the consignee after delivery has been made and transportation is at an end. An allowance in such cir-*

> *cumstances would constitute an unlawful rebate.* That is true of interstate shipments under the laws of Congress. Act to Regulate Commerce (Feb. 4, 1887) 24 Stat. L. 379; secs. 2, 3, 17; Act of Feb. 19, 1903, 32 Stat. L. 847; Act of June 29, 1906, 34 Stat. L. 584. It is true of intrastate shipments under the laws of New York. Public Service Commissions Law (Laws 1907, c. 429) secs. 31, 32. [Italics supplied.]

And later the opinion reads (p. 119):

> We are asked in the opinion of the Appellate Division whether it can be "the policy of the nation to prevent the most economical production of manufactured goods or to compel the defendant to cart its vast shipments from cars placed upon the plaintiff's own side tracks remote from defendant's works." The assumed alternative is an unreal one. The question is not whether switching within the plant shall cease. The question is, who shall pay for it? To compel the plaintiff to pay by deducton from the regular rates for any service not a part of transportation is to prefer the defendant over others. Armour Packing Co. v. U. S., 209 U. S. 56, 72, 28 Sup. Ct. 428, 52 L. Ed. 681. It is not the policy of the nation to place useless clogs upon commerce, but it *is* the policy of the nation that preferences shall be impossible.

In *Chicago & Alton Ry.* v. *United States,* (C. C. A., 7th Cir.) 156 Fed. 558, payments to an industry for use of its plant tracks in getting the industry's

freight out to the railroad (560) was held, not to be an allowance (561), but a departure from the rates, or a rebate under the Elkins Act. The fact that the case was a criminal prosecution certainly does not take from the force of the decision, and there is much in the opinion of interest here. Among other things the court said, p. 562:

> * * * Both acts were aimed to kill favoritism, and the favoritism in the Wight Case was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroading was always counter to the common-law pact between the railroads and the people. But it was not until the government as *parens patriae* was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

It is clear that the regulatory scheme of the Act, particularly as protecting the general run of shippers under the rates, has its very foundation in the provisions of Section 6, requiring the publication and strict observance of tariffs, these same requirements being supplemented by the Elkins Act and its provisions for prosecutions against shippers as well as carriers. Section 6 prohibits transportation of

property or persons without tariffs published and on file; prohibits the collection or receiving of "a greater or less or different compensation" than that published in the tariffs; and prohibits the refunding of any portion of the rates "in any manner or by any device." The broad and comprehensive requirements and prohibitions of Section 6, and those of the Elkins Act, concerning the publication of tariffs and the strict observance thereof demonstrate beyond doubt that the tariffs are for service, and at rates, to be open to all alike. This, being the very crux of the regulatory scheme, leaves no room for departures from published tariffs (either in respect of the rate or in respect of the service for which the rate pays) in any manner or by any device whatsoever. *Southern Ry.* v. *Reid,* 222 U. S. 424, 442; *Chi. & Alton* v. *Kirby,* 225 U. S. 155, 165; *L. & N. R. R.* v. *Mottley,* 219 U. S. 467; *C. & O. Ry.* v. *Westinghouse, Church, Kerr & Co.,* 270 U. S. 260.

Prior decisions of the Commission and of the courts are so thoroughly dealt with in the main report (R. 18–32) that very little further reference to them seems necessary. As there said (R. 23), most of the Commission cases "did not go to the merits of the allowances, as such, but were founded upon" unjust discrimination resulting from a carrier's refusal to grant an allowance to one industry while doing so for a rival, or rivals, similarly situated. The Commission's orders in those cases (its

so-called alternative orders) required the carrier to desist from the unjust discrimination; that is they left an election whether to desist from giving the preference to the rival industry, or to grant the allowances (or accord "spotting") to the complainant industry. And generally such orders were complied with by granting allowances to the complainant. It will be seen that this would be particularly true where the defendant carrier met with competition from other carriers at the preferred industry, or industries. Insofar as appellees are suggesting that these alternative orders are administrative precedents, the most they can urge is that the Commission did not broaden those proceedings on its own motion and, in fact, then undertake what it has undertaken in this proceeding.

As further stated in the Commission's main report Commission cases dealing with the merits have been consistent; and the discussion in the report shows this. Appellees point to the *Car Spotting Case*, 34 I. C. C. 609, apparently as contrary to, or inconsistent with the many other determinations. But that case involved a suspension proceeding with respect to proposed tariffs of charges for all manner of deliveries, including spur and direct one-placement plant deliveries—an entirely arbitrary selection, for which reason the tariffs were cancelled without prejudice to the filing of others. (R. 25) Aside from this, two things in that decision dispose of appellees' contentions: In the Com-

mission's main report in this proceeding (R. 25), speaking of the *Car Spotting Case,* it said:

> * * * On page 616 we referred to our finding in the *Los Angeles Switching Case, supra,* that where the service was merely a substitute for team-track receipt and delivery the line-haul rate covered the service, for the reason that rates generally in this country had been constructed upon that basis. * * *

On the succeeding page (R. 26) a quotation is given from the *Car Spotting Case,* emphasizing:

> * * * The line-haul rate, however, covers only one placement of the car for loading or unloading and an additional charge should be made for each additional placement of the car for that purpose.

As further noted in the main report (R. 26) the *Second Industrial Railways Case,* 34 I. C. C. 596, immediately precedes the *Car Spotting Case* "in the bound volume." The quotation from that case reads:

> * * * The sixth group is composed of industrial plant tracks which are neither owned nor operated by common carriers and are not dedicated to public use, the ownership and right of use being in the controlling industries which operate them. They ask that allowances be paid them out of the locality basis of rates under section 15 of the act, upon the theory that they are performing a service of transportation which the

> trunk line is obligated to perform under the rate structure. This question was considered in the *General Electric Co.* and *Solvay Process Co. cases, supra,* and it is not necessary to enlarge upon it here. * * *.

In its final discussion of the *Car Spotting Case,* the main report (R. 31) refers to the fact that in *Chesapeake & Ohio Ry.* v. *Westinghouse-Kerr & Co.,* 270 U. S. 260, this Court compared

> * * * the service covered by the C. & O. tariff, with that considered in *Car Spotting Charges, supra,* and in *Downey Ship Building Corp.* v. *S. I. R. Ty. Co.,* 60 I. C. C. 543. In the *Downey case,* division 2 at page 547 defined the carrier's obligation as involving "only one placement of a car and the movement to be made without interference and over the trackage suitable for the service."

As bearing out what is further stated in the main report (R. 31) with respect to that decision of this court, the decision of the Supreme Court of Appeals of Virginia, 138 Va. 647, 123 S. E. 352, affirmed by this Court, clearly shows that the "spotting" there involved was direct movements of cars from the carrier's yard to the unloading points on the construction company's side tracks (123 S. E. at p. 353) and as stated by the railroad's witness (p. 354) the consignee was entitled to one placement of the car.

Reverting to the decision in the *General Electric Case, supra,* its most significant statement is that

no allowance (or additional service) is due "after delivery has been made and transportation is at an end." Under conditions obtaining at the plant of the General Electric, the "spotting" of cars at actual unloading points could only be done, if the business of the carrier was subordinated to that of the industry and, by reason thereof, the decision holds that the delivery, terminating the transportation, was an accomplished thing when the cars were placed on the storage tracks. The conclusions of the Commission in the instant cases embody this principle. They are conclusions, based on operating conditions and circumstances particularly within the administrative field and knowledge and as such, are entitled to the usual weight accorded to administrative judgment. *Private Car Case,* 282 U. S. 740, 758; *Warehouse Co.* v. *U. S.,* 283 U. S. 401, 508; *Standard Oil Co.* v. *U. S.,* 283 U. S. 235, 240; *Erie R. Co.* v. *U. S.,* 280 U. S. 98, 100, 102.

The main determination by the Commission in the present cases is that the carriers had complied with their transportation obligations under the line-haul rate by delivery on the interchange tracks and the service beyond was plant service. From this it necessarily followed that there was no consideration to support an allowance out of the rates. This main determination is not unlike the main determination in the *Private Car Case,* 155 I. C. C. 775, which this Court upheld in *L. & N. R. R. Co.* v.

U. S., 282 U. S. 740. The question in that case was whether the carriers' practice of carrying free the office cars of other carriers was not illegal and unjustly discriminatory, and, principally involved therein, was the carriers' contention that the carrying of such cars, occupied by persons holding passes, was not "transportation of property" within the meaning of the Act but was merely the moving of a vehicle of transportation. As to this the Court said, pp. 757, 758:

> There is no ambiguity in the requirement of section 6 (1) of the Act that its provisions as to published tariffs "shall apply to all traffic, transportation, and facilities defined in this Act." Whether the private, or office, cars of other carriers are to be deemed property transported, or a facility of the carrying line, depends upon the circumstances of the carriage as matters of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape from the application of the broad provision of the statute.

The Commission's order in the *Private Car Case* was that the carriers desist from carrying free the office cars of other railroads. It could not be an alternative order merely requiring the carriers to desist from unjust discrimination because the office cars being "property transported" were subject to section 6. (See headnote 5 and the Commission's findings.)

Also the Commission's main determination in *Warehouse Co.* v. *U. S.*, 283 U. S. 501, is very like that in the present cases. That determination was that the Merchants warehouse was not a public freight station—an agency of the railroads—and its designation as such in the tariffs was purely nominal, the real purpose being to compensate the warehouse by allowances, for soliciting freight for the railroads. It found (160 I. C. C. 563, 566–569) that "the weight of the evidence" supported the contention, among others, of the complainants "that the loading and unloading of freight by the contract warehouses is not in fact transportation service and that allowances therefor, being for trade services, are illegal", and that "the record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses.' And, although it found further that payment of the allowances resulted in unjust discrimination and undue prejudice against the complainants, its order directed only, as pointed out by this court (p. 504), that the railroad "cease and desist from making allowances." In sustaining the order this court, after holding that the evidence justified the finding that the warehouses were not public freight stations, said the remaining questions were (1) "whether the services for which the allowances are made are transportation services for which the carriers may lawfully com-

pensate", and (2) "if they are, whether the carriers may discriminate by granting such compensation to appellants and not to others." Concluding its discussion of the evidence relating to the first question, the court said (pp. 510–511):

> Such allowances are forbidden, even though paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by secs. 2 and 3 of the Interstate Commerce Act.

The court went on to say, in addition, that payment of the allowances also unjustly discriminated against the complainants. But, it then made the following statement (p. 153), to which this Court's attention is particularly called:

> For reasons already indicated, the case is not one in which, as appellants argue, the carriers should be left free to remove the discrimination by extending the benefit of the allowances to the competing warehouses. Since the allowances are for services which include the assembling and distribution of carloads from or into less than carload lots, the objections to them would not be removed by extending them to some additional shippers of carloads at carload rates, but not to all, nor even to all under existing tariffs and classifications for the handling of carloads.
>
> * * *

In a recent decision involving suit for damages under the anti-trust laws on the same facts, *Terminal Warehouse Co.* v *P. R. R. et al.*, 297 U. S. 500, the court said:

> * * * The assumption was that the warehouses, though not owned by Pennsylvania, were, none the less, public freight stations supplied by a contractor (*United States* v. *Baltimore & Ohio R. Co.*, 231 U. S. 274, 288), and that the railroad in making payments or allowances for the handling of the freight was paying for transportation services rendered by an agent. * * * Those cases stood unquestioned until 1928, when one of them (*McCormick Warehouse Co.* v. *Pennsylvania R. Co., supra*) was reheard and overruled (148 I. C. C. 299), earlier decisions to the same effect falling along with it. The conclusion was then announced that a warehouse company doing business under such a contract was a consignor or consignee, acting on its own behalf and not as agent for the carrier. With this change in its relation discriminatory payments or allowances became forbidden and unlawful. 49 U. S. C., sec. 3 (1).

And later the decision reads:

> * * * By rule of the Consolidated Freight Classification a carrier may not distribute carloads of freight in less than carload lots, nor assemble smaller lots into carloads. 283 U. S. at p. 510. Thus the opinion makes it clear that the whole system

> of warehouse stations, with its payments and allowances, including the incidental saving of demurrage, had been built upon a false foundation. Adherence to the statute called for its suppression. * * *

Reverting, then, to the case at hand: With the delivery completed and transportation ended by placement of the cars on the hold tracks, the conclusion must follow that the subsequent plant spotting of cars is not part of the interstate transportation that has been already ended by delivery already completed and that accordingly no allowance is due or can be lawfully paid to plaintiff industries.

The tariffs referred to in section 6 are not tariffs for particular shippers (*C. & A.* v. *Kirby, supra; C. & O.* v. *Westinghouse etc. Co.*, 270 U. S. 260, 266), and the allowances referred to in section 15 (13) are not for service rendered by a shipper, which, if performed by the carrier, would violate the Act. In *Merchants Warehouse Co.* v. *United States, supra,* it was said at pp. 511–512:

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co.* v. *Interstate Commerce Comm.*, 282 U. S. 740. In that case we held that a carrier may not haul private cars of some of its passengers free of charge and deny the privi-

> lege to others on the theory that it is using the cars which it carries free, as instrumentalities of transportation. The very selection of the cars of some passengers and not others for the favored treatment was held to be a forbidden discrimination. The order of the Commission upheld there would be futile if discrimination could still be effected by filing an exception to the carrier's tariffs for hauling private cars, designating some private cars as transportation facilities, and then granting allowances to the owners for their use. That, in substance, and practical operation, is the effect of tariff exceptions and the allowances which the present order forbids.

For the proposition that publication in tariff form can not legalize unlawful refunds and discriminations see also *Interstate Commerce Commission* v. *B. & O. R. Co.*, 225 U. S. 326, 345; *C. & A. Ry.* v. *U. S.*, 156 Fed. 558; 560; *C. R. Co. of N. J.* v. *U. S.*, 229 Fed. 501, 507–509; *Gallagher* v. *P. R. R.*, 160 I. C. C. 563, 568. Regardless of publication in tariffs, allowances are "lawful only when supported by a consideration. To pay shippers for doing their own work" is "a mere gratuity," *Mitchell Coal Co.* v. *P. R. R. Co.*, 230 U. S. 247, 263.

3. The findings made by the Commission in each case are sufficient to support the respective order

The contention made by appellees that the Commission did not make the requisite specific findings

in the present cases does not deny that in each supplemental report the Commission has found and recited all pertinent basic facts concerning the physical location and arrangement of each of the plants, of the plant tracks, of the interchange and other tracks of the carriers, and of the "actual conditions of operation" (*Los Angeles Switching Case*, 234 U. S. 294, 311), and all pertinent circumstances relating to the physical movement of the cars. Nor do appellees deny that from the basic facts thus found, the Commission, in each case, made the ultimate essential finding and conclusion that the spotting of cars within the plants of the respective appellees is not a service which the carriers are required or permitted to perform or pay for under their line-haul tariff rates. The contention, therefore, really is that, in addition to the full basic findings and ultimate conclusions made, the Commission was required to make the further finding that not only was the payment of any allowance at all unlawful, but that it was unduly preferential. It is a further application of the same contention which we have answered in discussing, under the last point, the Commission's power to make the orders. That discussion need not be repeated here, but is respectfully referred to.

The only requirement in the Act having any bearing on the matter of findings is the provision of section 14 which states that it shall be the Commission's duty, after an investigation has been

made, "to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Thus the only "findings of fact" required by the statute itself is in cases in which the Commission awards damages—a subject which is not before the court in any of these cases. In *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, this Court, in sustaining an order of the Commission which required carriers to cancel a tarff upon a finding that division or switching absorption paid by the carriers was so large as to amount to a preference or indirect rebate, said (pp. 487, 489–490):

> In orders of this kind, not including an award of damages, formal and precise findings no longer are necessary; section 14 having been amended in this respect by Act of June 29, 1906, c. 3591, 34 Stat. 584, 589.

In *United States* v. *Louisiana*, 290 U. S. 70, the Court said: "There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457, 490." In *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, in sustaining an order of the Commission, the Court said (pp. 286–287): "The findings in the report being thus accepted as true, there is left only

the inquiry whether they give support to the conclusion. * * * The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Of particular significance in the instant cases is the decision of this Court in *A. T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, in which the Court held that the Commission's order, involving yardage charges for services in the Union Stockyards, could not be sustained because the Commission had "made no definite finding as to what constitutes complete delivery or where transportation ends." The finding which the Commission failed to make in that case is the precise and fundamental finding made by it in each of the supplemental reports in these cases, for in each case it finds that transportation ends or begins at the interchange tracks.

In *Koppers Gas & Coke Co.* v. *United States*, 11 F. Supp. 467, the sufficiency of the Commission's findings, which were identical to those in the cases at bar, was challenged, and the court held (p. 469):

> It would seem that the main essential ultimate basic fact to sustain the order of the Commission in this case is that the transportation service terminated at the gateway of the petitioner's plant. If that finding of the Commission is sustained by the evidence, then it would follow that the allowances provided for in the tariffs were gratuities paid to the shipper, and clearly preferential.

Identical findings were also held sufficient by a three-judge court for the Northern District of Indiana in *Elgin, Joliet & Eastern Ry Co.* v. *United States*, and *East Chicago Dock Terminal Co.* v. *United States*, decided January 23, 1937, not yet reported.

We submit that the findings contained in each of the supplemental reports (Appendix B to each petition, R. 49, R. 66, R. 83, R. 100, R. 116, R. 129) fully meet the requirements of the statute and of the decisions just mentioned. Not only has the Commission made the necessary ultimate finding or conclusion of fact in each report, but it also has set forth and found all necessary and pertinent basic facts. Since neither the statute nor the decisions of the courts require any particular form or statement of findings of fact, the findings in the cases at bar are clearly adequate. Each fact stated and found in the report necessarily is a "finding" of that fact, without being labelled as such by the Commission. The findings in each report clearly furnish a "rational basis" for the order which rests upon them. (*Mississippi Valley Barge Co.* v. *United States, supra*, p. 287.)

The circumstances presented in the cases upon which appellees rely for support of the claimed insufficiency of the findings in the instant cases are clearly distinguishable. The reports in each of the cases at bar supply and contain the essential findings which the court held in those decisions to be

lacking. Thus, to illustrate by mentioning one of the cases relied upon in *United States* v. *B. & O. R. Co.*, 293 U. S. 454, the Commission had power, under the statute there invoked, to require changes in the reversing gear of locomotives upon finding as a fact that the change was required to remove "unnecessary peril to life or limb." That finding was held to be essential to the issuance of an order, and inasmuch as the Commission had not made the required finding the order was enjoined. In other words, the Commission omitted the very finding of fact which was necessary to enable the court to determine whether there was the prerequisite factual basis for the order.

4. The orders are supported by substantial evidence

It is important, before discussing the sufficiency of the evidence, to observe the nature of the contention that the orders are not supported by the evidence. All the petitions make similar allegations concerning the lack of evidence, and reference to one will suffice for the present purpose. Taking the allegations of Allegheny Steel Company's petition as illustrative (R. 53), it will be noted (R. 61–62, section XII, 4–6) that it is not alleged that the basic facts found and stated in the Commission's report (showing the physical arrangement of the plants, the plant facility tracks, the location and arrangement of the interchange tracks and the spurs of the trunk lines leading thereto, and the circumstances and conditions

under which the physical movement of the cars between the interchange tracks and points within the plant are performed, including plaintiffs' requirements for "on call" spotting service) are without support of evidence, or that the facts stated by the Commission are not proved by the evidence. It is merely alleged that there was no evidence upon which the Commission could find that the railroads have complied with their *obligation* under their line-haul rates by placing cars on the interchange tracks or removing them therefrom; or that the movement of cars beyond the interchange tracks and within the plant is a plant service; or that payment of an allowance to the plaintiffs provides the means by which they enjoy a *preferential service* not accorded shippers generally; or that payment of allowances for the spotting service *violates section 6 (7)* of the Act. Further allegations are that the *evidence affirmatively proves* that the spotting of cars is a *transportation service* which the railroads are bound to furnish or pay for; and that the evidence *fails to* show any violation of law by the plaintiffs or the railroads in connection with the plant spotting or allowances therefor. These are the only particulars in which the petitions challenge the sufficiency of evidence to support the orders. But the allegations plainly fail to allege that there is insufficient evidence of the physical facts and actual conditions of the operation involved in the performance of the spotting service.

Appellees' argument in the court below demonstrated that their real contention with respect to the sufficiency of the evidence is that the Commission should have accepted the individual views, conclusions and opinions of witnesses concerning the carriers' legal obligations under the line-haul tariffs, and concerning so-called "custom and usage", and should not have drawn its own conclusions from the undisputed physical facts showing the actual conditions of operation in performing the spotting service. The contention, therefore, resolves itself into a quarrel with the Commission concerning, not the lack of facts or the absence of substantial evidence, but the weight to be given and conclusions to be drawn from abundant and undisputed evidence which the record does contain. This type of attack upon the sufficiency of the evidence cannot prevail. *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 100; *The Assigned Car Cases*, 274 U. S. 564, 580; *Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658.

The decision of this Court in *Merchants Warehouse Co.* v. *United States, supra*, p. 508, shows that whether a particular service is, in fact, a transportation service which the carriers must perform under or pay for out of their line-haul rates or is a trade service or plant service, is a question to be decided by the Commission upon evidence which discloses the physical character of the services and

the actual conditions and circumstances under which, and the purposes for which, the services are performed.

Similarly, in *Los Angeles Switching Case, supra,* (234 U. S. 294) the Court, after adverting to so-called "custom and usage" said (p. 311):

> But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined *according to the actual conditions of operation.* Such a question is manifestly one upon which it is the province of the Commission to pass. [Italics supplied.]

The presently important point made clear in that decision is that whether any such switching service constitutes a transportation service which the carriers are obliged to perform under their line-haul tariffs is a question which must be decided upon the physical facts and circumstances which disclose "the actual conditions of operation." The Court further said, at p. 311, that, if based upon evidence, it must take "as conclusions of fact" which "are not open to review", the Commission's findings

> as to the character and manner of use of the industrial spurs [as distinguished from in-

> traplant tracks] in Los Angeles—that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds.

The carefully considered opinion of the Court of Appeals of New York in *New York Central & H. R. R. Co.* v. *General Electric Co., supra* (114 N. E. 115, certiorari denied, 243 U. S. 636), also demonstrates that whether plant spotting of cars on plant tracks for loading and unloading is a part of the carriers' transportation duties under their line-haul tariffs, or, as the question is there stated, "Where does transportation begin and end?", is a question to be determined upon evidence disclosing the physical arrangement of the industry, of its plant tracks, the interchange or "hold" tracks of the carriers, and of the actual conditions and circumstances of the physical movement of the cars, including the fact as to whether the physical movement takes place at the discretion and convenience of the carriers or at the direction and under the "jurisdiction" of the industry. Again, in *L. & N. R. R. Co.* v. *U. S.*, 282 U. S. 740, at pp. 757–758, the Court said that whether private cars of other carriers are to be deemed property transported or a facility of the carrying line "depends upon the circumstances of the carriage as matters

of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape" from the statute. To the same effect is the decision in *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, in which the court held that the services of gathering and soliciting traffic and combining it into carloads for transportation over the railroad, although "in a practical sense" connected with such transportation, were not services "connected with it as a necessary part of the carriage—were not 'transportation service' * * * and in our opinion were not such services as were contemplated in the Act", (Section 15(13)). The rule of these cases and the character of the evidence upon which they were decided should be kept in mind in considering the discussion of evidence now to be presented in each of the separate cases before the Court.

AMERICAN SHEET & TIN PLATE CO. v. UNITED STATES

The bill of complaint in this case (R. 1) seeks to enjoin and annul the Commission's order of July 5, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying allowances of $1.10 per loaded car to the appellee for performance of "spotting service" within its industrial plants at Vandergrift, Pa., and Wellesville, Ohio, and that the Pennsylvania Railroad Company and the Baltimore & Ohio Railroad Company cease and desist from paying allowances of $1.14 to appellee

for performing such spotting service within its plant at Scottdale, Pa. (Report, R. 49, Order, R. 51.)[9]

The spotting service performed by appellee consists of moving with its own locomotives and crews loaded and empty cars between interchange tracks at the entrance to appellee's plants and points within the plants at which the cars are unloaded or loaded.

Appellee's plant and its physical arrangement, type and location of buildings, location and number of plant tracks and spotting points, and the location and arrangement of the interchange tracks, spur tracks, and main line of the railroads are shown in detail on a blueprint or map produced in evidence as Exhibit C–164 (Special Exhibits). Witness Cramer, in charge of appellee's Transportation Division, gave a detailed description of the physical facts just mentioned (R. 231–236), and described the physical circumstances and conditions under which appellee performs the spotting service. Appellee's Vandergrift plant has been in operation more than thirty years, manufacturing steel by open hearth and rolling process.

[9] At the hearings before the Commission, appellee, with the consent of the Commission's counsel and examiner, selected the spotting services at its Vandergrift plant as typical of those performed at the three plants just mentioned. (Or. Tr. 10444–5.) Pursuant to this agreement, the Commission's findings and order relate to and include the three plants.

It and the Wellsville plant are served by the Pennsylvania exclusively, while the Scottdale plant is served by the Pennsylvania and the Baltimore & Ohio. The interchange tracks at which the carrier delivers and receives cars to and from appellee at the Vandergrift plant is located at the west end of the plant. Within the plant there are 5 loading and 15 unloading points where freight cars are spotted (R. 236), and there are 8 miles of plant track consisting of two main tracks with which 20 or 25 additional plant tracks connect. These tracks are all owned and operated by appellee. In performing the spotting service between the interchange tracks and these loading and unloading points, appellee moves the cars a maximum of 5,400 feet, a minimum of 800 feet, and an average of 2,500 feet. During the year 1930, taken as a typical year, plaintiff handled inbound, 5,783 cars, and outbound, 6,181 cars, in this spotting service. (R. 232–233.) Appellee owns 4 switching locomotives, 3 of which are in constant use over a 24-hour period in performing spotting service and intra-plant switching (R. 235). The nature of the spotting service at the Vandergrift plant has not changed since 1915 (R. 233), and appellee has always performed this service and has never requested the railroad to perform it (R. 232–233). Appellee received no allowance for the service between the time the plant began operating in 1902 and the time when the allowance was first made in 1917 (R. 233).

Weighing of outbound traffic is required by appellee for its industrial purposes and the weights are used by the railroads for billing purposes. (R. 234.) A considerable amount of inbound traffic, including scrap, pig iron and limestone, is weighed by appellee to ascertain whether the freight charge is being assessed on the correct weight, and whether "we are actually getting what we are paying for." (R. 234.) The weighing necessitates moving inbound cars from the interchange tracks to the scales, and, after weighing, then to the final point of placement. Weighing of outbound cars requires the same movement, but in reverse. The scales are located between the interchange tracks and the loading and unloading points (R. 234). Thus, as stated by the Commission, the railroads could not perform the spotting service "in one uninterrupted movement at its ordinary operating convenience," because appellee requires that the cars be weighed. (R. 50.)

Plant requirements, convenience and interference.—The operation of appellee's plant requires continuous spotting service, and if the railroads undertook to perform the service, their locomotives would have to be assigned for continuous service at the plant (R. 237), though they might be busy all the time. When the railroad delivers a string of cars on the interchange tracks, appellee immediately spots the car "if we have immediate need for them," but if they are not required immedi-

ately the cars are moved from the interchange tracks "in the regular course of our spotting and work." (R. 233–234.) Ordinarily, appellee moves cars delivered to it on the interchange tracks in as few trips as efficient operation permits, but when particular carloads of material are required in the plant operation, it immediately spots "such cars as are immediately needed," leaving others on the interchange track (R. 234). The witness stated that plaintiff was willing to permit the railroad to perform the spotting service (R. 233), but that, if the railroad undertook to perform the service, it "would be required to place the cars after their arrival at Vandergrift as needed" (R. 234), and that would require assignment of a locomotive to the plant, which the witness said "could be arranged to conform to our needs" (R. 234). He stated that he did not think there would be any interference between the railroad and the plant operations if the railroad undertook to perform the spotting service (R. 234), but that it would require "cooperation between the two sides." (R. 236.)

Witness Cramer further testified with respect to spotting service at appellee's plants located at Farrell, New Castle and Monessen, at which the railroads themselves perform the spotting service (R. 240). He stated (R. 241) that at those plants the railroads perform the spotting service "only as ordered by the industry"; that "the railroads

wouldn't place any which we didn't ask them to place," and that the railroads hold the cars on their own tracks until ordered by appellee to bring them into the plant, saying, "We order down what we require and what we need."

Witness Dixon, an employee of the Pennsylvania Railroad, stated that "the power that we have located at Vandergrift, or in that vicinity rather, would not negotiate all the curves in the plant of the American Sheet & Tin Plate Company at that place", and that after the railroad has delivered cars on the interchange track the cars "are taken in by the mill shifters as needed, and in a great many instances, cars are left on interchange tracks that they do not need at that time", and further that there are "always cars on the interchange tracks, either loaded or empty" (R. 238).

Witness Kulp, of the Pennsylvania Railroad, stated that the carrier could not operate over the Scottdale plant tracks with its engines assigned to that vicinity, and that "if the Pennsylvania undertook to perform that service, it would require bringing in to the plant a particular type of engine not in common use in that general district, an engine of smaller type * * * that could negotiate all the tracks" (R. 237).

Custom and usage.—The history of the spotting service performed by appellee at its Vandergrift plant demonstrates the error of the assertion that there is a general custom of carriers to spot cars

at points within industrial plants as part of their line-haul transportation duty, or to pay industries for performing the service. Here, it is shown that the railroad has never performed the service for appellee although the plant has been in operation thirty-five years (since 1902), and that it was not until 1917 that the railroad paid appellee an allowance for performing the service. Moreover, payment of the allowance was not because of any change in either the line-haul rates, so far as the record shows, or of any change in the nature of the service performed, for Witness Cramer said that there had been no substantial change in the nature of the service since January 1, 1915 (R. 233).

ALLEGHENY STEEL CO. v. UNITED STATES

The petition in this case seeks to enjoin and annul the Commission's order of June 7, 1935, requiring the Pennsylvania Railroad to cease and desist from paying an allowance of $1.07 per loaded car for switching or "spotting" cars within its plant at Brackenridge, Pa. (Report, R. 66; Order, R. 69).

Appellee manufactures steel and alloy products and various kinds of railroad supplies. For many years the Pennsylvania has delivered to and received from appellee loaded and empty cars upon designated interchange tracks at appellee's plant. The spotting for which appellee receives the allowance consists of the movement of cars with its locomotives between the interchange tracks and par-

ticular points or "spots" within the plant where appellee requires the cars to be placed for loading or unloading. The cars are moved from and to the interchange tracks throughout each 24-hour period as and when the appellee's manufacturing processes require the contents of the inbound loaded cars and the movement of finished products to make room for the continuous outturn of the plant.

Appellee's plant and its physical arrangement, location and type of buildings, location and number of plant tracks, and the location and arrangement of the interchange tracks, the spur tracks and main line of the railroad, are all shown in detail in Ex. C–147 (Special Exhibits). Witness Carr, Taylor and Mimm submitted (R. 199, 200 and 201 respectively) a description of the physical facts just mentioned. Their testimony shows, and the Commission's report states (R. 66), that the plant covers approximately 100 acres of ground, of which 75 acres are occupied by the plant buildings and structures. (R. 199.) Within the plant there are 150 industrial tracks and sidings totaling 10 miles in length. The cars are spotted at 10 important loading and unloading points, and at 3 scrap yards, and at 5 or more locations at which the cars are loaded and unloaded by aid of locomotive cranes. (R. 200–201.) As will be seen from Ex. C–147, this large industrial plant has a great number of separate buildings and manufacturing units, and a

complex and intricate net-work of plant tracks used in carrying raw materials from one to another unit in the manufacturing process. It is bounded on the north by the main line of the Pennsylvania and on the south by the Allegheny River, facilities for both rail and water transportation being available. (R. 200.) About 80 inbound cars are handled at this plant daily (R. 201), but the record does not show the number of outbound cars. As long ago as 1919, appellee handled annually within this plant as many as 25,000 cars, containing raw materials inbound and finished products and waste material outbound. (R. 200.) All of the plant tracks from the interchange tracks into and throughout the plant are owned by plaintiff. (R. 200).

Appellee owns and operates within the plant 7 switching locomotives, of which 5 are normally in active use (R. 201). During one-third of the average 24-hour period these locomotives are engaged in "spotting" or moving cars to and from the interchange tracks. During the other 16 hours they are used in intraplant switching, that is, moving cars from one manufacturing unit to another within the plant. (R. 201.) The spotting service, however, is not done in 8 consecutive hours but is performed throughout the 24-hour period. (R. 203.)

Weighing of all inbound carload shipments is required by appellee for which purpose the "spot-

ting" movement from the interchange track to the unloading point is interrupted. The cars "are first taken from the interchange track, weighed on the scale, and then spotted for loading and unloading." (R. 201.) Those weights are taken for appellee's purposes, and not at the request of the Pennsylvania, but the latter uses them for shipping weights. (R. 201–204.) Appellee also requires weighing of its outbound traffic "both light and gross", and the Pennsylvania also uses those weights for billing purposes. (R. 201.) From this testimony the Commission properly concluded that if the railroad undertook to perform the spotting service, the plaintiff's requirement that all cars be weighed for industrial purposes would necessarily prevent the railroad from moving the cars in one "uninterrupted movement at its ordinary operating convenience" between the interchange tracks and the loading and unloading points. (R. 68.)

Plant requirements, convenience and interference.—Cars are moved to and from interchange tracks "as a particular plant unit requires them" (R. 201).

That the convenience of appellee in its manufacturing processes and not the convenience of the railroad must be served in performing the spotting service is established beyond doubt by the testimony of appellee's Witness Carr (R. 202–203). He said that appellee would be willing to permit the railroad to perform the service "if they do it

as expeditiously and as efficiently as we do it ourselves", which he explained by saying "if you have to wait two or three hours to get a car at the point where you want it from one service, and you can get it in twenty minutes from another service, the quicker service is the one that we require and we desire." He further said "I would certainly want it [the cars] spotted when we wanted it and as we wanted it spotted", and that "the convenience of the trunk line from my standpoint is not the convenience of the consignee or the shipper. What might suit the railroad's convenience might entirely delay the operation of our plant and also delay the production of finished material for shipment over the railroad * * *" (R. 202). His testimony conclusively shows that if the railroad undertook to perform the service it would have to do so entirely under appellee's "jurisdiction." He said (R. 202-203) it would be satisfactory to appellee for the railroad to perform the service if it assigned its locomotives to the plant and if "the movement of these locomotives and their work for the entire time that they are there is subject to the plants' orders." In the *General Electric Case, supra,* the Court held, p. 118, that "reasonable delivery does not involve the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant," or "to subordinate the operation of the business of the carrier to the needs, the economies, the internal administration of the business of the shipper."

Witness Dixon, an employee of the Pennsylvania, testified (R. 203) that "the power that the Pennsylvania has in this vicinity could not do the spotting at this plant because it is too large to take the curves." He said that if the Pennsylvania undertook to perform the service it "would have to furnish power suitable to negotiate this industry's tracks", which would have to work under the jurisdiction of the plant yardmaster under his orders, of course, because we wouldn't know what requirements he would have. (R. 203.) He further said that if the railroad brought in smaller locomotives that could negotiate appellees plant tracks "they would not be of any other use on this division" (R. 204).

Custom and usage.—Concerning appellee's assertion of an established custom of the carriers in placing cars at loading and unloading points as part of the service required under their line-haul rates: Witness Carr testified that for 29 years before obtaining an allowance, appellee performed the spotting service at its own expense, and that one of the reasons it asked for an allowance was that other iron and steel industries were being paid for similar services. (R. 202.) It is undisputed that during the entire existence of the plant to the present day the "custom" of the railroad at this plant has been, and now is, to deliver loaded cars and receive empty cars on the interchange tracks which have been designated and agreed

upon by the railroad and appellee for that purpose. The "custom" of the railroad at this plant for twenty-nine years was neither to perform the service nor to pay an allowance. Furthermore, as stated in the Commission's supplemental report (R. 67) and in Witness Carr's testimony (R. 202) the railroad refused consistently throughout the twenty-nine year period to concede any obligation to perform or pay for the spotting service. It did not pay any allowance until after the Commission found that by paying to others and refusing either to pay appellee or to perform the service, the railroad subjected appellee to unjust discrimination, and issued an order giving the railroad the alternative of either ceasing the payment of allowances to others or of paying them to plaintiff. In that case, however, the Commission expressly held that the evidence did not establish that it was unreasonable for the railroad to refuse either to pay an allowance or to perform the service as a part of its duties under the line-haul rates. (R. 67, and 60 I. C. C. 575.)

PITTSBURGH PLATE GLASS CO. v. UNITED STATES

The petition in this case (R. 70) seeks to annul the Commission's order of June 25, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying an allowance of 65 cents per loaded car to appellee for performing plant spotting of cars within its plate glass plant at Ford City, Pa. (Report, R. 83; Order, R. 86.) In 1929,

appellee handled 6017 cars at this plant, in 1930 it handled 4043 cars, and in 1931 it handled 3396 cars. (R. 84.) About one-third of these cars were outbound and the balance contained inbound raw materials.

Plant arrangement, equipment and power.— Exhibit C–160 (Sp. Exs.) is a map or blueprint showing in detail the arrangement and location of buildings, plant tracks, spur tracks and their connection with the main line. This exhibit was explained by Witness Putnam, assistant superintendent of the plant (R. 214), who also pointed out the spots or locations at which cars are placed for unloading and loading. The plant contains 8 or 9 miles of industrial track connecting with the various buildings and units of the plant. Appellee has two locomotives operating in the plant, one of which is now in use about three hours each day (R. 215–216). These locomotives operate over all of the plant tracks in performing both the spotting service and intra-plant service between the different units. One of the plant tracks over which spotting service is performed has a curvature of 25 degrees, but other tracks used in this service can be negotiated by switching locomotives of the railroad (R. 216). There are numerous "spots" at which appellee requires cars to be placed for unloading, there being one or two for each of the operating units in the plant, and some 15 such points being detailed by the witness (R. 215–216).

Four "spots" for loading outbound cars were shown (R. 216).

Weighing.—All inbound freight is weighed for appellee's industrial purposes. On outbound freight, "the package weights are taken." Appellee's scales are located on the east side of the plant (R. 216).

Plant requirements, convenience and interference.—Appellee requires performance of interchange spotting 5 or 6 hours each day, and one locomotive could perform the service "if he was there at the proper hours", which would be designated by the industry. The spotting is required from 10 a. m. to 4 p. m. each day, and during that time appellee's own locomotives are performing intraplant switching (R. 216).

Witness Dixon, an employee of the Pennsylvania, knew of no physical obstacle within the plant to prevent the railroad from performing the service; but, he stated, that the Pennsylvania has no locomotive in that district which could negotiate appellee's industrial tracks and that to perform the service it would have to bring in from elsewhere and assign a locomotive to that plant exclusively, to cover the "spread period" of 5 or 6 hours during which appellee requires spotting. He thought, therefore, that it would be more economical for the Pennsylvania to pay the allowance than to perform the service. (R. 217.)

The result of an attempt by the Pennsylvania to perform the service at this plant is shown in a pre-

vious decision of the Commission and is referred to in the testimony (R. 217). The complaint, filed with the Commission in 1919, alleged that the Pennsylvania's refusal to perform the service or to pay appellee its cost of performing the service was unreasonable, unjustly discriminatory and unduly prejudicial, and prayed for an order requiring the Pennsylvania to pay appellee a reasonable allowance. The Commission's report, *Pittsburgh Plate Glass Co.* v. *Director General*, 58 I. C. C. 81, states, at p. 82:

> Prior to about 1903 the defendant carrier did the switching and spotting, together with a large proportion of the intermill work, without extra charge, but the service became unsatisfactory and was a hindrance to the plant, and the complainant took it over with its own motive power. In December, 1906, complainant's representative made application verbally to the defendant carrier for an allowance to cover the cost of the service performed at the Ford City plant, which has been followed up in conferences from time to time, thus far without success. On the other hand, complainant has never asked the carrier to perform the service, but is willing that it should if performed efficiently and satisfactorily, not merely at the carrier's convenience, and it is urged that the service could not be efficiently performed by the carrier unless an engine was devoted exclusively to such service.

The Commission did not find that it was the Pennsylvania's legal duty to perform the service or to pay an allowance, but found upon the facts of record that the Pennsylvania's failure to do so was not shown to be unreasonable. It said (p. 84):

> In determining the reasonableness of the practice of the carrier the real issue is whether the service performed by complainant is one which ought to be done by the carrier as a substitute for delivery on its own tracks, or one reasonably contemplated at the line-haul rate. In this case no increased charges have been imposed upon the complainant by reason of a cancellation of former allowances or a discontinuance of a switching and spotting service by the trunk lines since January 1, 1910, nor has that line ever been called upon to perform the service in lieu of an allowance.

The Commission found, however, that the Pennsylvania's refusal to perform the service or to pay an allowance, while performing similar service or paying allowances therefor to appellee's competitors, resulted in undue prejudice to appellee, and issued an order giving the Pennsylvania the alternative of performing or paying the industry for the service, or of ceasing the performance of or payment of allowances to competitors.

Witness Glenn, an employee of the Pennsylvania, testified that the 65-cent allowance which was fixed and published in 1927 after the Commission's decision, was a "purely arbitrary" figure,

and represented one-third of the estimated cost to the railroad of performing the service (R. 217). He said that after the Commission's decision, the Pennsylvania undertook, on August 2, 1927, to perform the spotting service but quit on September 11, 1927, because "the service was so unsatisfactory that we agreed to pull out our power * * *. Evidently, the work inside the plant, our engine in there at the same time, caused an unsatisfactory arrangement." He also said that the arrangement was not satisfactory to the Pennsylvania (R. 217-218).

Appellee does not deny these facts nor does it claim that the evidence is insufficient to prove them. Indeed, it is in no position to deny that there is complete evidence of the physical arangement of the plant, the tracks, the nature of the service, and the actual conditions under which it must be performed, for the evidence of those facts was submitted by appellee's own witnesses.

The evidence clearly shows that the service must be performed at appellee's direction and not at the convenience of the railroad. It is obvious that the failure of the Pennsylvania's attempt to perform the service in 1927 was due to the impossibility of making any arangement which would meet appellee's industrial needs and, at the same time, serve the Pennsylvania's convenience. In other words, to perform the service at all, the Pennsylvania would be compelled "to subordinate" its

operation "to the needs, the economies" of the plant. *General Electric Case, supra.* The evidence further shows that inbound cars cannot be spotted in an uninterrupted movement for the reason that appellee requires that all such cars be first taken from the interchange tracks to the scales to be weighed for its industrial purposes. And the evidence further establishes that the Pennsylvania's locomotives which operate in that district cannot negotiate the industrial plant tracks, and that to perform the service itself the Pennsylvania would be compelled to obtain a suitable locomotive and assign it exclusively to performance of appellee's service. The evidence clearly furnishes ample support for the Commission's order. Upon evidence disclosing similar facts, the courts rested the decisions in the *General Electric Case, supra; Los Angeles Switching Case, supra;* and *Warehouse Co.* v. *United States, supra.*

"Custom and Usage."—This record does not show when the plant began operations but the Commission's earlier report, 58 I. C. C. 81, finds that it was operating before 1903. It states (p. 82) that prior to 1903 the Pennsylvania performed the switching "but the service became unsatisfactory and was a hindrance to the plant, and the complainant took it over with its own motive power." It is plain that there has been no uniformity or "custom" in the performance of or payment for the service at this plant. The Pennsylvania performed the serv-

ice prior to 1903, but from that year to 1927 appellee performed it and received no allowance. The record shows no change in the line-haul rates when the Pennsylvania ceased performing the service in 1903 or when it began paying the allowance in 1927. These facts clearly negative the view that there has been any custom at all concerning the service at this plant. When the matter was before the Commission in 1920, the Pennsylvania defended the suit, thus showing that it recognized no legal obligation to perform the service, but during the litigation it offered to perform the service "if included within its legal duty, provided the service is performed without interference and the tracks are in such condition that its locomotives can operate over them" (p. 83). The effect of the Commission's decision in that case necessarily is that the service was not one which the Pennsylvania was under legal duty to perform under its line-haul rates, for it rejected appellee's contention that the Pennsylvania's refusal to perform or pay for the service was unreasonable. Thus the Commission has twice decided, upon facts which fully disclose the nature of the service and the conditions under which it is performed, that car spotting in this plant is not a service which the railroad is required to perform under its line-haul rates.

In this case (R. 87) appellee seeks to enjoin the Commission's order of June 24, 1935, which requires the Pennsylvania Railroad Company to cease and desist from performing spotting service for appellee at its plant at Weirton, W. Va., or paying an allowance therefor. (Report; R. 100; Order, R. 104.) At this plant the carrier itself performs the spotting service instead of paying an allowance, though in 1929 it published an allowance of $1.23, which appellee, however, has declined (R. 209). During a period of plant construction between 1919 and 1921, appellee performed the service at several of the separate units of the plant (R. 209).

Plant arrangement, equipment; and power.—The first unit of the plant was constructed in 1909. Witness Earp, appellee's traffic manager, introduced in evidence Exhibits C–153 and C–154, (Special Exhibits) the first of which shows the growth of the plant unit by unit, and the second of which is a map or blueprint showing the locations of the seven major units or departments of the plant, the location and arrangement of the Pennsylvania's main line, the interchange tracks, and appellee's industrial tracks within the plant. The Pennsylvania owns 14 miles of track which extends through the middle of the plant, and appellee owns 25 miles of industrial tracks which extend from the Pennsylvania's tracks to the several separate units or

departments of the plant (R. 209–210), each of which has its separate industrial track layout (Ex. C–154, R. 209–210).

The evidence shows that there are some 20 distinct points within the plant at which cars are loaded and unloaded (R. 210). The longest switch movement necessary in spotting the cars is 5200 feet, the shortest 400 feet, and the average 2300 feet, while from 4 to 5 miles of appellee's private track is used by the Pennsylvania in performing the spotting service (R. 210–211).

Appellee maintains 9 locomotives within the plant, 5 of which are large switching locomotives and 4 are small wheel engines, the former being used in intra-plant switching and the latter in handling materials between different buildings and units of the plant (R. 210–211). The Pennsylvania operates 3 locomotives in the plant: One is used 24 hours per day in interchange switching and spotting at the Steel Works, another is used 16 hours per day for spotting at the strip mills, and still another serves several units of appellee's plants a total of 7 or 8 hours but at different units and hours during the 24-hour day. This locomotive also serves plants of other nearby industries when not engaged at appellee's plant (R. 211).

The spotting service.—As stated, the Pennsylvania performs all spotting of cars in this plant. Cars destined to the Steel Works are switched by the Pennsylvania from its railroad yard and deliv-

ered upon two storage or interchange tracks where that switch movement ends. Appellee's locomotives later move the cars from the interchange tracks to its scales, weigh them in order to obtain the weight of inbound freight, and move them back and place them upon the interchange tracks. Then when the contents of the cars are required at the Steel Works, the Pennsylvania's locomotive moves the cars from the interchange tracks and spots them at the particular points in the Steel Works at which appellee desires to unload them. (R. 211, 214.) Thus there are two separate and distinct switch movements by the Pennsylvania of cars spotted at the Steel Works; and between the time of those separate movements, appellee itself handles the cars from the interchange tracks to the scales for the purpose of industrial weighing. This interruption by appellee of the Pennsylvania's spotting service is to enable the plant to dispense with the charge that would be made if the railroad did the weighing (R. 211). Cars destined to or from other units or departments of the plant than the Steel Works are not held upon interchange tracks but are spotted by the engine of the Pennsylvania which brings them into the plant (R. 212); but the Pennsylvania brings in from its yard only such cars as are called for by appellee. (R. 211–212.)

Weighing.—Appellee requires that all inbound freight be weighed except iron ore, coal or lime-

stone, which, however, are sometimes weighed to ascertain whether there has been a loss in transit (R. 211). All outbound cars containing finished products, except the plant and structural mill products, are weighed, the weighing in both instances being done on appellee's scales (R. 211). As stated above, the weighing of inbound cars to the Steel Works is done by appellee to avoid paying the railroad the weighing fee. This is accomplished by the plant handling the cars between the scales and interchange tracks, thus necessitating interruption of movement of the cars between the Pennsylvania yards and the "spots" in the plant, and resulting in two separate movements, now performed by different engines in switching the cars from the railroad yard to the final "spots" at the Steel Works. The Pennsylvania weighs cars which it spots at units other than the Steel Works and receives the tariff fee for such weighing (R. 211).

Plant requirements, convenience and interference.—The Pennsylvania spots the cars according to a "schedule" arranged by appellee to meet the requirements of the various departments of the plant. Its conductor is given a "pull slip" or written order by appellee directing the placement of the cars at the spots required by it (R. 211–212). At the Steel Works where the Pennsylvania maintains a locomotive "24 hours a day, 7 days a week", the operation is under the direction of ap-

pellee's yardmaster or foreman, who gives the engine foreman "a written work order telling him what cars must be moved to a certain department * * * and what time, of course." The Pennsylvania performs for plaintiff what is called a "stand-by service" (R. 212–213). In answer to the question whether it would be possible for the Pennsylvania engine to spot cars at the Steel Works upon any schedule convenient to it and without regard to appellee's requirements, Witness Earp answered (R. 212–213);

> * * * The engine assigned to the Steel Plant works under the supervision of the yardmaster or foreman of the Steel Plant, who gives the engine foreman a written work order telling him what cars must be moved to a certain department and when. The Pennsylvania engine is there to do what the industry wants done. This engine is assigned to stand-by service 24 hours a day, 7 days a week. This particular department could not be worked on schedule. An engine must be at hand all day long. In normal operation this engine does not have any idle time. There are 25 miles of track at this plant and in addition to this, 12 to 15 miles of track are on railroad property, which is shown in red.

A witness for the Pennsylvania testified that all the spotting service performed by it at this plant is performed under the direction of the plant, and that occasionally there might be some inter-

ference of the Pennsylvania's locomotives by the operation of appellee's plant locomotives (R. 240). He further testified that it would be impossible for the Pennsylvania to perform the service by going in any time it was especially convenient to them to arrive there and spot the cars without having some arrangement made with the industry; and that the program for spotting the cars was nothing more than an attempt to synchronize the two services within the plant. (R. 214.)

Thus the spotting service cannot be performed at this plant without "the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant", and, in order to perform the service the Pennsylvania is required "to subordinate the operation of the business of the carrier to the needs, the economies, the internal administration of the business of the shipper", *General Electric Case, supra*, p. 118. The services and the conditions under which they are performed are identical to those which the court held in that case to be "plant facilities" and which the carrier was not required to perform as part of the "reasonable delivery" called for by its line-haul rates.

Clearly the facts which we have set forth above, and the positive statements of the witnesses concerning the circumstances under which the work must necessarily be done, furnish ample support for the Commission's conclusion that the spotting of cars within this plant "is a plant service which

respondent is not obligated to perform and for which it is not compensated under its line-haul rates", and for the other conclusions stated it its supplemental report (R. 103). It must be remembered that appellee does not dispute the facts found by the Commission. Indeed, it could not be so because they were stated by its own traffic manager. Nor does appellee claim that evidence is lacking to prove the facts found. Its contention is that the Commission should have drawn other conclusions from the facts established by the evidence. Similar evidence was held sufficient to support the Commission's findings in *Los Angeles Switching Case, supra,* and *Warehouse Co.* v. *United States, supra.*

The lack of uniformity or of the asserted "custom" is again illustrated by the situation at this plant: For the first ten years the railroad performed the spotting service, but from 1919 to 1921 it did not perform the service at several of the departments of the plant nor did it pay an allowance for appellee's performance of the service. Since the latter date, the railroad has performed all the service, and appellee has declined to perform the service for an allowance of $1.23 per car. During this period the Pennsylvania refused definitely either to perform spotting service for the Allegheny Steel Company or to pay that company for performing the service, and recognized no such obligation with respect to that company until

1930. Further illustrations of the lack of a uniform custom is found in the four other cases before the court.

We submit that the evidence in this case, considered in the light of principles of the decisions cited in this portion of our brief, adequately supports the order.

WEST LEECHBURG STEEL CO. v. UNITED STATES

Appellee seeks in this case (R. 105) to enjoin the order of the Commission issued July 29, 1935, requiring the Pennsylvania Railroad Company to cease and desist from paying an allowance of $1.28 per loaded car for spotting cars within its plant at Leechburg, Pa. (Report, R. 116; Order, R. 119.) Appellee is engaged in the manufacture of hot and cold rolled strip and skelp steel. In 1929, operating at 67% of plant capacity, it handled 11,000 cars into and out of the plant in spotting service.

Plant arrangement, equipment and power.—Appellee's traffic manager introduced in evidence as Ex. C–156 (Special Exhibits) a map or blueprint showing in detail the plant arrangement, number and location of buildings, industrial tracks, interchange tracks, and the main line of the railroad. Appellee's plant contains 17 industrial tracks aggregating about 4½ miles in length which serve 8 important points where cars are spotted for loading and unloading. The plant is bounded on the north by the Pennsylvania tracks and on the

south by the Kiskiminetas River, and is served by two interchange tracks, one for outbound and one for inbound cars. At these tracks the Pennsylvania delivers and receives cars in two shifts inbound and two shifts outbound each day, at the present time, while appellee is operating its plant on an 8-hour shift (Ex. C–156, R. 206). Appellee maintains one switching locomotive which it uses in interchange and other service continuously while the plant is operating. It also operates one locomotive crane which engages in intra-plant work only (R. 206).

Spotting service.—After the Pennsylvania has switched inbound or outbound cars from or to its main line and delivered them on the inbound or outbound interchange tracks, appellee's locomotives move them to or from the spots within the plants in the following manner (R. 206–207):

> When the plant power hooks on to the inbound cars at the interchange tracks, the cars are moved west on the inbound interchange track to a point near the 16-inch hot mill marked "scale", in red pencil, on the blue-print; farther down to the spur just east of the P. R. R. westbound to Kiski Junction, and then back in under the various unloading points at the 16-inch hot mill marked "Craneway", "Shipping Craneway", "12-inch hot mill Craneway", and the track leading back to the building marked "9-inch H. M." The outbound movement cars are taken from the four outbound load-

> ing platforms. The largest platform is located between the cold mill and the warehouse; the second platform at the warehouse; the third at the 16-inch hot mill; and the fourth at the 12-inch hot mill.

Weighing.—Appellee weighs all inbound cars for its own purposes only, but outbound cars are not weighed. The time consumed in weighing the cars is excluded from the estimated amount of expense incurred by appellee in the spotting service which is covered by the allowance paid it by the railroad.

History of the allowance.—The record does not show just when this plant first began operations, but apparently it always performed its own spotting service without an allowance until 1927. The circumstances leading to the publication and payment of the allowance are succinctly described by appellee's witness. (R. 206.)

The reasons for appellee's dissatisfaction with the spotting service performed by the Pennsylvania appear in the testimony of the same witness. He stated (R. 207) that the Pennsylvania sent a locomotive into the plant for an hour or two during the morning and again in the afternoon but that this was insufficient to "take care of all the interchange work"; and that (R. 207):

> Cars were left on the interchange tracks and the plant had to complete this work. Usually the Pennsylvania's locomotives only spent one hour in the morning and one in the afternoon at this plant. The carrier

> fixed a definite amount of time to devote to the interchange work. The railroad never did satisfactorily perform the spotting services at this point. While we have two shifts a day there are cars placed at different times a day by through trains; for instance, the cars that we receive from the Bethlehem Steel Company at Johnstown are usually placed at our plant by a Pennsylvania train somewhere around three or four o'clock in the afternoon, and quite often we could not wait until the following morning for the railroad to spot those cars for unloading, and it was necessary for us to get the cars, weigh them, and get them into the mill and unload them. During the period that the Pennsylvania handled this spotting service the cars were weighed in the same manner as they are now. The spotting by the Pennsylvania was unsatisfactory because cars were left on the interchange track by through trains after the afternoon shift. The plant could not wait for the morning shift to receive these because it was necessary to use the material immediately, so it was necessary for the industry to go out and get the cars itself.

The court will note that the witness stated (R. 207) that the reason appellee performed part of the spotting service during that time was that it received carloads of material which were required immediately in its manufacturing and that it could not wait for the regular spotting schedule of the Pennsylvania.

Plant requirements, convenience, and interruption.—As shown from the testimony already quoted, appellee receives materials used in its manufacturing processes which it must have spotted at various units of its plant for immediate use, thus necessitating "on call" interchange or spotting service 24 hours a day or whenever the plant is in operation. This evidence, therefore, clearly proves that the continuous spotting service is required solely to meet the needs of appellee's industrial operations and manufacturing processes, and that service satisfactory to appellee could not be performed by the Pennsylvania at its own convenience or upon any "set" schedule. The evidence with respect to weighing shows that the spotting service is not and could not be performed in connection with inbound cars in one uninterrupted movement because appellee requires that all inbound cars be moved from the interchange tracks to its scales for weighing and then spotted at unloading points.

This evidence is corroborated by testimony of an employee of the Pennsylvania. Witness Dixon explained why the Pennsylvania withdrew its power and arranged to pay the industry itself for performing the spotting service (R. 208).

From this testimony it is plain that the Commission properly concluded that the spotting service "has to be performed at the convenience of the industry", and that appellee's requirement for

weighing inbound cars prevents them from being spotted in "an uninterrupted movement" (R. 118). The testimony also clearly justifies the further conclusions stated in the Commission's report including the conclusion that the spotting of cars "are plant services" which it is not the duty of the railroad to perform, and that the interchange tracks constitute "a reasonably convenient point" for delivery and receipt of cars. (R. 118.) The evidence shows that excepting the three months during which the Pennsylvania attempted to perform the service, the interchange tracks have always been the point agreed upon between the railroad and appellee for delivery and receipt of cars. From this and the further fact that the cars could not be moved beyond the interchange tracks and spotted at the various units of the plant except when and as directed and required by appellee to meet its manufacturing processes, it seems a fair conclusion that placement of the cars upon the interchange tracks constituted the delivery to which appellee contends it is entitled, that is, "at reasonably convenient and accessible places" for loading and unloading. (R. 118.)

In this case, as in the other cases before the court, appellee makes no claim that the evidence is insufficient to prove the physical facts showing the plant arrangement, tracks, and the conditions under which the physical movement of the cars is performed. Nor does it deny that the evidence

proves that spotting service must be performed solely at its own convenience and direction, nor that the inbound cars can be spotted in an uninterrupted movement. It ignores all of these undisputed facts, and appears to base its claim on the assumption that the carrier is under the legal duty to perform the service, and upon the statement of witnesses that to perform the service would cost the railroad more than the amount of the allowance paid, and that, if the railroad must be required to perform the service or pay for it, it prefers to do the latter.

As in the other cases, the "custom" at this plant contradicts counsel's assertion of a "forty-year custom" of performing the spotting of cars as part of their line-haul duty.

The evidence clearly furnishes abundant support for the Commission's ultimate conclusion that performance of the service or payment of the allowance by appellee is in violation of the Act. Whether a carrier's line-haul tariffs require it to perform a particular service and whether such service is a transportation or a plant service are conclusions to be drawn by the Commission from facts showing "the actual conditions of operation", *Los Angeles Switching Case, supra;* and the credibility of witnesses and the weight to be given evidence are matters for the Commission and not for the courts, *Warehouse Co.* v. *United States, supra.*

Appellee seeks in this case (R. 120) to enjoin the Commission's order of September 12, 1935, which requires the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company to cease and desist from paying allowances of 75¢ and 65¢, respectively, per loaded and empty car, to appellee for performing plant spotting of cars in its plant at Crystal City, Mo., where it is engaged in the manufacture of plate glass. (Report, R. 129; Order, R. 132.)

Plant arrangement, equipment and power.—The arrangement of this plant, location of buildings, plant tracks, spur tracks and their connections with the Missouri Pacific and the Frisco, are shown in 4 charts or maps introduced by witnesses for the appellee and for the railroads (Exs. A–151, 152; 154, 155; Special Exhibits). (Or. R., Vol. 3, pp. 394–401.) A complete detailed description of the plant and the circumstances under which the spotting service is performed are set forth in the testimony of witnesses McMillen (R. 219) and Brown (R. 222). The facts so stated by those witnesses are accurately and succinctly summarized in the Commission's report, and, inasmuch as appellee does not deny that the evidence establishes the *facts* stated in the report or that the report correctly states the facts concerning the physical arrangement of the plant and tracks and the conditions

under which the service is performed, we quote those facts from the Commission's report (R. 130):

> The plant contains numerous buildings and about 27 railroad standard-gage tracks approximately 4 miles in length, which reach the numerous points of unloading and loading within the plant. The plant is served by the Missouri-Illinois Railroad Company, a subsidiary of the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company hereinafter generally termed the Missouri Pacific and the Frisco respectively.
>
> The main line of the Frisco from St. Louis, Mo., to Springfield, Mo., parallels the plant on the northeast side of the plant property and passes through a yard containing about 10 tracks located at the Crystal City station. One of the plant lead tracks parallels the Frisco main line and connects therewith at a point about 1,300 feet north of the Crystal City station. Another connection is made with the yard tracks about 500 or 600 feet northeast of the station with what is known as the Crystal City Railroad. This connection is seldom used, but to reach the plant through this connection it is necessary to cross the Frisco main line. Cars are delivered to the plant by the Frisco on any available track in the Crystal City yard. Outbound cars are placed on tracks in this yard designated by the agent at Crystal City. Cars consigned to the plant for the north are moved directly by the lead connections

> with the main line of the Frisco to Crystal City yard. The plant engines then move the cars in the reverse direction over the Frisco main track to point of connection with the plant lead track, thence over the lead track into the plant. The track layout in the plant is complicated and contains many sharp curves. The tracks encircle the plant and there are many spur tracks leading to the different loading or unloading points, at least one of which is elevated.

Weighing.—With respect to the weighing of the cars received at and shipped from the plant, the report states (R. 130):

> All cars, both loaded and empty, are weighed on a scale within the plant property. All cars, except those to be loaded or unloaded on the track on which the scale is located, after being weighed require a back-up movement to the point of switch with other tracks for placement for loading or unloading. Likewise there is required movement of the cars beyond the switch point leading to particular spurs, and a back-up movement from the switch point to the points of loading or unloading on such spur tracks.

Witness for the industry testified that weighing is done for the plant although it might also serve the convenience of the railroads (R. 225).

The spotting service.—The Commission's report contains the following summary of the facts disclosing the conditions under which the service is performed (R. 130):

The Frisco has never actually placed cars within the plant but, as far back as 1908, it entered into an agreement with the glass company under which cars are to be delivered to or received from the glass company on the tracks in Crystal City yard, above referred to. This agreement gave the glass company the right to operate its engine over the main line of the Frisco between the Crystal City yard and the point of connection with the plant tracks. Local trains of the Frisco operating through Crystal City usually arrive at that point late at night, and it would not be possible for the local to perform the necessary switching in the plant upon arrival, for the reason that the heavy locomotives could not operate over all the plant tracks in performing the necessary spotting service, because of curvature. Such spotting service could only be performed by the assignment of a switching locomotive at Crystal City. The switching engine could not be employed elsewhere in that vicinity, which means that it would be necessary to pay for an 8-hour trick to perform the service at the plant. At the time of the hearing it was stated it would take approximately two hours to perform such service, but in normal times the amount of traffic to be handled would be between 20 and 30 cars, and it was testified it would then take approximately five hours due to the complications within the plant because it is necessary to operate solely

between and into buildings and to protect the many employees working there.

The Commission summarized and stated the facts of record concerning the allowance paid to appellee by the Missouri Pacific as follows (R. 131):

> The Pittsburgh Plate Glass Company many years ago acquired the Crystal City Plate Glass Company, which prior thereto had built what is known as the Crystal City Railroad. A branch of this railroad extends from the Mississippi River to the plant of the glass company. It was constructed to bring to the glass company coal arriving via barge. In 1923 the Mississippi River & Bonne Terre Railroad made connections with the Crystal City Railroad and received from and delivered traffic to the industry at a point on the Crystal City Railroad about 1,000 feet from the point of connection. For the movement of cars between this point and the points of loading and unloading within the plant the glass company received an allowance of $2 per loaded car, which for competitive reasons was participated in by the Missouri Pacific. On January 1, 1929, the Mississippi River & Bonne Terre was leased by the Missouri-Illinois Railroad and about the same time the Missouri Pacific acquired control of the latter. On May 1, 1932, shortly before the hearing, the point of interchange with the plant was changed to two open tracks of the Crystal City Railroad located 6,000 feet nearer the

plant. The amount of the allowance was also changed at that time to 75 cents per car both loaded and empty. For the privilege of operating over the Crystal City Railroad to the present points of interchange the Missouri-Illinois maintains the tracks in a safe condition for the operation of its locomotives and furnishes the nonsalvageable material. The glass company furnishes the salvageable material. As in the case of the Frisco the engines operating the local trains of the Missouri-Illinois could not operate over the plant tracks because of excessive curvatures. Furthermore, if that carrier undertook to perform the switching it would be necessary to pass the point of connection with the Frisco northeast of the plant and cross the main line of that carrier in reaching the plant.

History of allowances.—The allowance paid by the Frisco was initiated in 1908, as shown by the contract in which it is provided (Ex. A–153), and it has always been 65¢ (R. 222).

The allowance of 75½ now paid by the Missouri Pacific was first made by the Mississippi River & Bonne Terre Railroad (now owned by the Missouri-Illinois Railroad which is a subsidiary of the Missouri Pacific), and the original allowance was $2 for each round trip of a car into and out of the plant (R. 230). Referring to the decision to pay the allowance, a witness for the Missouri Pacific said: "It was entirely a competitive arrangement

as we viewed it", and that the railroad sought the arrangement merely as a traffic inducement (R. 230). Appellee's traffic manager also stated that the allowance "was a traffic competitive proposition" (R. 231). The amount of this allowance was later reduced to 75¢ per loaded and empty car.

In connection with the allowance paid by the Frisco, the following statement from the Commission's report is important (R. 131):

> * * * The present tariff of the Frisco provides for an allowance to the industry, for performing the service in the manner indicated, of 65 cents per car for both loaded and empty. If an inbound car is made empty and the empty moved to another point in the plant for loading outbound, four allowances are paid. It is contended that the cost to the industry of moving the empty car, from the track in the plant where it is made empty, over the scale where it is weighed, thence to another track in the plant where it is to be loaded, involves as much service as the movement of the empty car from the plant to Crystal City yard and the bringing in of an empty from that yard to the point of loading.

Plant requirements, convenience and interference.—There are apparently some 10 spots at which cars are placed for unloading within the plant, and some of these are on elevated tracks (Ex. A–154, R. 222). Cars are spotted within the

plant for loading and unloading upon the industrial tracks "as the industry wants them". (R. 223.) Explaining his statement that it would take 5 hours to spot 20 cars within the plant, a witness for the Frisco said (R. 221):

> The reason why it would take 5 hours to switch 20 cars is on account of the physical layout. A switcher would have to go very slow around the buildings and there are a good many men working within the plant. It takes considerable time to switch that plant. As far as I know the industry would permit us to perform the switching. They have a gate at their plant and at times it is kept closed. To switch the industrial tracks would be much more complicated than that of the ordinary industrial or team track that I am familiar with.

He further said that the plant arrangement and tracks were such that both of the railroads could not spot cars within the plant at one time (R. 221); that the Frisco had no switch engine at Crystal City which could perform the service, and that if it undertook to perform it, it would be necessary to bring in an engine from elsewhere and assign it exclusively to that plant (R. 220–221). For the Missouri Pacific to reach the plant it must cross the Frisco tracks, but the switch movement could be made if the Frisco would consent to the crossing (R. 227).

In view of the fact that the cars must be spotted "as the industry wants them", rather than at the carriers' convenience, a curious situation results from the statements of witness Stanage, an employee of the Frisco, that the allowance is paid in recognition of that carrier's legal duty to make delivery under its line-haul rates, but that, nevertheless, it is his position that the service must be done at the carrier's convenience, and that, "we don't think it is our duty to go in there and spot a car every hour or two whenever the industry wants it" (R. 224). In other words, the Frisco denies any legal duty to spot cars in the plant, except at its own convenience, yet it pays for a service which, appellee's witnesses say, can be performed only at appellee's convenience.

"*Custom and Usage.*"—The lack of a uniform custom of the two railroads serving this plant is made clear by the testimony. The Frisco has paid the allowance since 1908, and has never performed the service. The contract (Ex. A–153) in which the allowance is provided, states no consideration for the allowance or any recognition by the Frisco of a legal duty to perform or pay for the service. It states: "the rate of compensation herein provided is fixed subject to adjustment at any time between the parties hereto if business conditions render a revision thereof necessary."

The "custom" of the Missouri Pacific and its subsidiary which initiated the allowance in 1923, is clear. Their witnesses frankly state that "it was entirely a competitive arrangement." (R. 230.) The Missouri Pacific neither performed the service nor paid any allowance for it until it saw fit to offer the allowance "merely as a traffic inducement" (R. 230). Thus, during a period of 15 years, one of the two carriers serving appellee's plant paid an allowance which it now claims that it pays in recognition of its legal duty, while the other carrier neither performed the service nor paid an allowance, and apparently recognized no such legal duty, for it frankly states that it paid the allowance as a traffic inducement. Moreover as already demonstrated, the Frisco is paying for a service which, in fact, is one that it denies it is required to perform under its line-haul rates.

The evidence clearly establishes that appellee's requirements for weighing prevent any possibility of the railroads performing the service in an uninterrupted movement, for the movement of each car must be interrupted at the scales for industrial weighing. It establishes that appellee's manufacturing requirements will not permit the spotting service to be done at the railroad's convenience but will permit cars to be spotted only "as the industry wants them". And it further shows that if both railroads undertook to perform their claimed legal

duty to spot the cars hauled by them to the interchange tracks, their engines would necessarily interfere with each other unless one railroad stood aside and waited until the other completed the spotting of its cars.

Such "cooperation in the division of labor and of functions" between a carrier and a shipper was held in the *General Electric Case, supra,* to constitute no part of the carrier's duty under its line-haul rates to make "reasonable delivery." The undisputed facts showing the arrangement of the plant, the industrial tracks, the spur tracks, and their connection with the main lines, and the "actual conditions of operation", are of the same nature which the court held sufficient to support similar findings by the Commission in the *Los Angeles Switching Case, supra,* and *Warehouse Co.* v. *United States, supra.* As in the other cases before the court, appellee does not deny that the evidence proves those facts. It does not really contend that the Commission drew conclusions without evidence, but merely that the Commission reached the wrong conclusion from evidence. It is the duty of the Commission to draw its own independent conclusions from facts rather than to accept and adopt the conclusions and opinions of witnesses. The evidence is clearly sufficient to justify the conclusions upon which the order rests.

CONCLUSION

The decision of the District Court should be reversed, the injunctions ordered dissolved, and the petitions dismissed.

STANLEY REED, *Solicitor General.*

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

ROBERT H. JACKSON,
Assistant Attorney General,

ELMER B. COLLINS,
Special Assistant to the Attorney General,

EDWARD M. REIDY,
Assistant Chief Counsel,
Of Counsel.

APPENDIX

Pertinent provisions of the Interstate Commerce Act are:

Section 1, subdivision 3, provides:

> (3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Section 6, subdivision 1 and 7, reads:

SEC. 6. [*Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 6.*] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and

conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 12 (1) of the Act provides:

SEC. 12. [*As amended March 2, 1889, February 10, 1891, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 12.*] (1) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this part, and shall keep itself in-

formed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

The provisions of Section 13, subdivisions 1 and 2, are:

SEC. 13. [*As amended June 18, 1910, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 13.*] (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be

done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of

this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Section 15, subdivisions 1, 13, and 14, read as follows:

SEC. 15. [*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935.*] [*U. S. Code, title 49, sec 15.*] (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commissions on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provi-

sions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which or-

der shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part.

U. S. GOVERNMENT PRINTING OFFICE: 1937

FILE COPY

Office - Supreme Court, U
FILED
APR 9 1937
CHARLES ELMORE CROPL
CLERK

No. 734

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE AMERICAN SHEET & TIN PLATE COMPANY ET AL., APPELLEES

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

APRIL 1937.

INDEX

	Page
THE RAILROADS' BRIEF, AMICI CURAE	2
Misapprehension of appellees and the railroads concerning the effect of the orders	5
The holding of the lower court and admission of appellees that "special" or "extraordinary" conditions will relieve carriers of their obligation to "spot" cars in a particular plant destroys appellees' contention as to an absolute obligation arising from "custom and usage." The only substantial question left is whether the evidence is sufficient to support the orders	6
Arguments of appellees and the railroads are not based upon facts of record	9
COURT DECISIONS	12
PRIOR DECISIONS OF THE COMMISSION	15
CONCLUSION	23

CASES CITED

Adams v. *Mills*, 286 U. S. 397	13
Allegheny Steel Co. v. *Dir. Genl.*, 60 I. C. C. 575	19
Atchison etc. Ry. Co. v. *U. S.*, 295 U. S. 193	14
Car Spotting Charges, 34 I. C. C. 669	15
Chicago & Alton R. Co. v. *U. S.*, 156 Fed. 558	12
Covington Stock Yds. Co. v. *Keith*, 139 U. S. 128	14
East Chicago Dock Terminal Co. v. *U. S.* (decided January 23, 1937—not yet reported)	8
Elgin, Joliet & Eastern Ry. Co. v. *U. S.* (decided January 23, 1937—not yet reported)	8
Emergency Freight Charges, 1935, 208 I. C. C. 4	4
Ex Parte 103, Fifteen Per Cent Case, 178 I. C. C. 539	4
General Electric Co. and Solvay Process Co. 14 I. C. C. 237, 246	12
Increased Rates, 1920, 58 I. C. C. 220	4
In the Matter of Increases in Freight Rates, 219 I. C. C. 565, 566	4
Koppers Co. v. *United States* (Appendix D to brief)	8
Lake Terminal Case, 50 I. C. C. 489	18
Los Angeles Switching Case, 234 U. S. 294	12

137414—37——1

Page

Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467, 478 3
Merchants Warehouse Co. v. *United States*, 283 U. S. 501, 510–512 21
National Malleable Castings Co. v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537 17
New England Divisions Case, 261 U. S. 184, 190 3
Pacolet Manufacturing Company, Operating Allowance, 210 I. C. C. 475 6
Pick-up and Delivery Case, 218 I. C. C. 441 20
Pittsburgh Plate Glass Co. v. *Dir. Genl.*, 58 I. C. C. 81 18
Railroad Commission v. *So. Pac. Co.*, 264 U. S. 331, 347 3
Reduced Rates, 1922, 68 I. C. C. 676 4
Terminal Warehouse Co. v. *P. R. R. Co.*, 297 U. S. 500 19
Texas v. *United States*, 292 U. S. 522, 530, 531 3
Transit Commission v. *United States*, 289 U. S. 121, 127, 128 3
United States v. *Union Stock Yards Co.*, 226 U. S. 286 13
Virginian Ry. Co. v. *United States*, 272 U. S. 658 20
Warehouse Co. v. *United States*, 283 U. S. 501 19

APPENDICES

Appendix A—Decision of U. S. District Court, dated January 23, 1937, in *E. J. & E. Ry. Co.* v. *U. S.*, and *East Chicago Dock Co.* v. *U. S.* 25
Appendix B—Findings of Fact and Conclusions of Law by U. S. District Court in *Goodman Lumber Co.* v. *U. S.* (No opinion rendered) 39
Appendix C—Findings of Fact and Conclusions of Law by U. S. District Court in *A. O. Smith Corp.* v. *U. S.* (No opinion rendered) 47
Appendix D—Decision of District Court in *Koppers Company* v. *U. S.* (April 1, 1937) 51

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 734

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMERICAN SHEET & TIN PLATE COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEIRTON STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEST LEECHBURG STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

THE RAILROADS' BRIEF, AMICI CURIAE

The brief of the railroads, filed as *amici curiae*, states that the signatory railroads "are greatly interested in the questions presented in the cases at bar, and urge the affirmance of the decrees of the lower court." While consenting to the filing of the brief, the Government and the Commission believe that the Court's attention should be directed to the nature of the "interest" which the railroads, signing the brief, have in these appeals:

First. The orders in five of these cases are directed solely to the Pennsylvania Railroad Company, and in the sixth case the order is directed to the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company. Of the thirty-two railroads joining in the brief, only one—the Pennsylvania—serves the plants affected by the orders, and though that railroad had an opportunity, as a party defendant below, to express its views, it filed no answer to the petitions, took no part in the proceedings below, and, indeed, obtained a dismissal as to it upon "a stipulation disposing of the matters herein at issue between" it and the several petitioners below. (R. 187–189.) The two railroads named as defendants in No. 3136 (R. 120) filed no answer, took no part in the case, were severed on appeal (R. 584), and do not join in the railroads' brief in this Court.

Second: As this Court has often said, the changes made in the Interstate Commerce Act by Transpor-

tation Act, 1920, constituted a new departure in railroad regulation, which theretofore had been principally confined to the prevention of injustice caused by unreasonable or discriminatory rates or practices. There was, of course, no change made in the Act's principal purpose, which, from the beginning had been (and still remains) "to cut up by the roots every form of discrimination, favoritism and inequality." *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478. But the 1920 Act sought also to ensure an adequate and efficient national transportation service. This was to be accomplished in part by direct instructions to the Commission to fix rates that would "as nearly as may be" yield adequate revenue and a fair return to the carriers. (Sec. 15a (2).) However, the desired result of an efficient, national transportation service at rates, both just to carriers and reasonable to shippers, could not be obtained simply by raising rates and, accordingly, the new regulatory policy was in large measure directed to the prevention of waste, principally waste of a kind growing out of the carriers' competition with each other. *R. R. Comm.* v. *So. Pac. Co.*, 264 U. S. 331, 347; *Transit Commission* v. *U. S.*, 289 U. S. 121, 127, 128; *New England Divisions Case*, 261 U. S. 184, 190. In *Texas* v. *United States*, 292 U. S. 522, 530, 531, it is emphasized that the provisions of Emergency Railroad Act, 1933,

> Confirm and carry forward the purpose which led to the enactment of Transporta-

> tion Act, 1920. * * * It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. * * *

The general rate increases which the Commission has authorized in carrying out its duty to maintain an efficient transportation service are well known. *Increased Rates, 1920*, 58 I. C. C. 220 (increases ranging from 25 to 40 p. c.); *Reduced Rates, 1922*, 68 I. C. C. 676 (partial reduction of about 10 p. c.); *Ex Parte 103, Fifteen Per Cent Case*, 178 I. C. C. 539 (temporary increase on many selected commodities); *Emergency Freight Charges, 1935*, 208 I. C. C. 4 (emergency increase for temporary period ending June 30, 1936, and subsequently extended to December 31, 1936, 215 I. C. C. 439). There is now pending before the Commission a general application for increases to be embodied in many of the basic rates. Ex Parte 115, *In the Matter of Increases in Freight Rates*, 219 I. C. C. 565, 566.

The Commission's investigation in Ex Parte 104 into practices adversely affecting operating revenues is in the nature of a companion case to the *Fifteen Per Cent Case, supra*, and is there referred to (pp. 585, 586).

In the proceeding involved in these appeals, Part II of the above-mentioned investigation in Ex

Parte 104, the principal practices investigated related to the spotting of cars within industrial plants, that is, the work, at times done by railroad locomotives but more often by plant locomotives, of making the plant spotting movements between interchange, or hold, tracks, and various desired unloading or loading points within the plants. Under the conditions described by the Commission in these cases such work is unmistakably no part of the railroads' work under the rates. What the Commission condemns in these cases is payments made by the railroads of money to appellee industries for doing their own work. The general run of shippers enjoy no such "shrinking" of the rates they must pay, but, on the contrary, have been asked to bear the load of general increases while such refunds from the rates were being continued to many particular industries.

Misapprehension of appellees and the railroads concerning the effect of the orders

Both the appellees and the railroads apprehend that in issuing these orders the Commission has undertaken to "revolutionize" rate-making by requiring railroads to assess a separate charge in addition to the line-haul rates for any switching service performed by them in connection with the receipt and delivery of carload freight. No such situation is presented by these cases and no such result will follow a decision sustaining the orders. The Commission does not dispute that plant spotting of cars generally may be performed or paid

for by carriers as part of the receipt or delivery of cars under the line-haul rates. Its general report states (R. 16) "there must be such a delivery as is customary and reasonable", and makes it plain that at any plant at which the carriers are reasonably free to perform the spotting service at their reasonable convenience, they are obligated to deliver and receive cars at loading and unloading points within the plant. That this is the Commission's attitude is further demonstrated by one of its supplemental reports in this proceeding, *Pacolet Manufacturing Company, Operating Allowance*, 210 I. C. C. 475, in which it found, upon the facts, that the service performed by that company for the Southern Railway "is a service of transportation for which the Southern may lawfully pay an allowance in accordance with Section 15 (13) of the Act." Moreover, the Commission's main report states (R. 15) that in the majority of instances "the spotting is performed by the carrier at its convenience and without interruption or interference by the industry."

The holding of the lower court and admission of appellees that "special" or "extraordinary" conditions will relieve carriers of their obligation to "spot" cars in a particular plant destroys appellees' contention as to an absolute obligation arising from "custom and usage." The only substantial question left is whether the evidence is sufficient to support the orders

In the court below appellees' reasoning seemed to be that as the obligation of railroads under the line-haul rates ordinarily includes the placement of

cars for loading or unloading on industrial tracks, it necessarily follows that it is the railroads' absolute duty to perform or pay for the particular spotting services at the plants of appellees. But the court below rejected the view that the obligation is unlimited, and held (R. 534) that it "will not include special or particular 'spotting service'."

And now appellees recede from this assertion of the railroads' absolute duty, and admit in their brief (p. 9) that "certain extraordinary circumstances, not present in these cases, may relieve or limit this obligation." At page 30, the brief sets forth typical circumstances which they say will relieve the railroads of the asserted obligation.

It results that the only substantial question before the Court is whether the evidence is sufficient to justify the Commission's conclusion in each case that the conditions and operations within the plant are such as to terminate the carriers' transportation obligation under the rates at the interchange tracks, or, in other words, that the conditions under which the service is performed at each plant are not "customary and reasonable" or "ordinary". This is apparently the basis of the lower court's decision, although it ultimately held that the Commission's orders were "beyond its statutory power" for, after holding that spotting service is included in the carriers' legal obligation under the line-haul rates, the court qualified by saying (R. 534): "But this will not include special or particular 'spotting service' ", and then held (R.

535): "In the instant cases we find no circumstances which would relieve the carriers involved from the duty of 'spotting' the cars as part of the transportation imposed upon them by law." In discussing the language just quoted from the decision below, the three-judge court for the Northern District of Indiana said: "We think that statement is tantamount to saying that the Commission's factual conclusion to the contrary was not supported by substantial evidence", *Elgin, Joilet & Eastern Railway Co.* v. *United States*, and *East Chicago Dock Terminal Co.* v. *United States*, (decided January 23, 1937) (not yet reported [1]). In those cases the Commission's order was identical to the order in the cases at bar. We commend to this Court the reasoning of the court in those cases. That the question is one of the sufficiency of evidence is also plain from the decision of the three-judge court for the District of Minnesota in *Koppers Co.* v. *United States et al.* (printed as Appendix D to this brief) sustaining (Judge Sanborn dissenting) another similar order of the Com-

[1] The opinion is printed as Appendix A to this brief. The court's decision in those cases was on final hearing but no decree has yet been entered because the court has granted plaintiffs' request to consider an additional brief by plaintiffs "on new points and authorities". See also findings of fact and conclusions of law entered in December, 1936, (printed as Appendices B and C hereto) by the three-judge court for the Eastern District of Wisconsin in *Goodman Lumber Co.* v. *United States* and *A. O. Smith Corps.* v. *United States*, sustaining, without opinion, orders of the Commission identical to those in the instant cases.

mission. That Court also held that "carriers, to perform the full measure of their duty under line-haul rates, are not required to stand ready with a switch engine at all times to answer the call of an industry to spot cars within its plant", and further that the evidence in the proceeding before the Commission established "decidedly to the contrary" such universally established custom and practice as appellees here claim.

Arguments of appellees and the railroads are not based upon facts of record

The brief of neither the appellees nor the railroads submit any analysis or discussion of the evidence disclosing the particular conditions at appellees' plants. One topic of appellees' brief (p. 30) states "the extraordinary circumstances which will relieve the carriers of this duty are not here present." But there is no discussion under that topic of the evidence upon which these orders rest. At pages 56–57 appellees touch upon the evidence and there again they refrain from pointing to the particular circumstances and conditions of operation which, it would seem, that they contend render the spotting service at their particular plants "customary and reasonable" or *not* unusual and extraordinary.

Appellees cite (pp. 20–24) the testimony of several witnesses, including Witness Eyemans, a vice-president of the Pennsylvania Railroad. But the testimony cited refers merely to the claimed gen-

eral "custom and practice" of carriers of including spotting in the service performed under the line-haul rates. None of the witnesses discussed the conditions at appellees' plants. Nor does the brief of the railroads discuss the *facts* of record disclosing the circumstances and conditions under which the service is performed at appellees' plants. They assert (p. 7) that "there is no such interruption or interference" as to warrant the Commission in "condemning" the spotting service at appellees' plants, but their argument following this assertion is addressed generally to the subject of what might properly be regarded as sufficient interruption or interference to relieve the carrier of the service, and ends with the mere conclusion that the conditions at these plants do not constitute such interruptions or interferences. They do refer (p. 8) to the testimony of one of the appellees that in the "judgment" of the witness the railroad could perform the service without interfering with plant operations. But the same witness also made it clear that the service could not be performed at the railroads' own convenience but only at hours which have to be designated by the industry" (R. 216). They also refer (p. 9) to testimony of American Sheet and Tin Plate Company, but that witness said that if the Pennsylvania undertook to perform the service it "would be required to place the cars after their arrival at Vandergrift *as needed*", and "that could be arranged to conform to *our needs*."

Reference is also made (p. 13) to testimony of West Leechburg Steel Company stating that "there is nothing unusual in the operation of this plant. The demands of this company are not unreasonable as compared with other steel industries." This not only is a mere conclusion of the witness but the use made of it would also exclude from consideration by the Commission the physical facts showing the conditions of operation within the plant and compel it to accept the witness's conclusion. Moreover, the same witness had just previously said that efforts of the Pennsylvania to perform the service had terminated because it "couldn't perform the service when they needed it", and that "to spot the plant in a satisfactory manner it would be necessary to assign a locomotive to this plant all the time to place the cars at the time they were needed."

The evidence showing conditions at the plant of each appellee must be considered as a whole in testing its sufficiency to support the Commission's orders, and not in mere fragments or sentences disconnected from their context.

The Government's main brief (pp. 73–117) contains a fair and reasonably complete summary of the facts of record concerning the spotting service and the conditions under which it is performed at the plant of each appellee.

COURT DECISIONS

Court decisions are cited by appellees and the railroads in support of their view that because ordinary spotting of cars on private tracks is generally included in the line-haul rates, the particular spotting services at appellees' plants is necessarily so included. None of the cases cited undertakes to lay down any general rule of law as to what constitutes abnormal, extraordinary, or usual spotting service.

The *Los Angeles Switching Case*, 234 U. S. 294, which they cite (p. 9) as laying down a rule in this Court that delivery "embraces the performance of spotting service within an industrial plant" makes it clear (p. 307) that the spur tracks there under consideration were to be "distinguished from mere plant facilities such as were under consideration in *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558, and in the case of the *General Electric Company and Solvay Process Company*, 14 I. C. C. 237, 246", and points out, at page 310, that the Commission itself distinguished the delivery on those spur tracks from—

> Cases of * * * deliveries through a system of interior switching tracks constructed as plant facilities, were expressly distinguished by the Commission in 18 I. C. C., pp. 313, 314; and it is apparent that the ruling of the Commission would not apply in any case where by reason of the location and extent of the spur tracks and

> the character of the movement the facts were essentially different from those upon which the decision was based.

The decision of this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, cited by appellees (p. 10) and the railroads (p. 20) is not in point. The question there was whether the Union Stock Yard and Transit Company was, itself, a common carrier subject to the Interstate Commerce Act, and this Court held that it was. The case did not involve the spotting of cars by a shipper within its private plant after delivery of them by a railroad upon interchange tracks at the plant door. Instead, the service there under consideration was the movement of cars by the common carrier, the Stock Yard Company, from the junction of its tracks and those of the trunk lines to unloading pens within the yards. Moreover, both that decision and the later decision of this Court in *Adams* v. *Mills*, 286 U. S. 397, 409, hold "that the yards are, in effect, terminals of the railroads * * *. They are in fact used as terminals; and necessarily so." And the latter decision makes it plain that whether a particular service is a transportation service cannot be decided, as the railroads and appellees attempt now to do, upon general conclusions and opinions of witnesses or upon conditions at other plants, but must be decided upon the facts at the particular terminal or plant in question. The opinion reads (pp. 409–410):

> Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311.

The more recent decision of this Court in *Atchison, T. & S. F. R. R. Co.* v. *United States*, 295 U. S. 193, which involved delivery at that stockyard, is to the same effect.

Finally, the peculiar conditions affecting the transportation of livestock, as distinguished from ordinary "dead" freight, caused Congress to enact as the statutory obligation of carriers the duty of loading and unloading shipments of livestock and providing pens for that service (Interstate Commerce Act, Section 15 (5)), following this Court's decision in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 136, which is cited at page 304 of its

decision in *United States* v. *Union Stock Yard, supra.*

It is plain that no rigid rule of law has been or could be laid down as to what constitutes reasonable delivery at every industry. As stated by the Vice President of the Pennsylvania Railroad (R. 457): "Each and every case * * * has got to be considered on its merits * * *."

PRIOR DECISIONS OF THE COMMISSION

Appellees contend that previous decisions of the Commission foreclosed its findings against these appellees. After citing several of its reports, they state (p. 19): "In reliance upon this chain of decisions of the Commission, industries were built and developed." The railroads say (p. 33) that by its decisions the Commission has "tacitly recognized" that the duty of carriers under the line-haul rates does not end on interchange tracks at private plants but includes "a spotting service." The first decision relied upon was rendered by the Commission on July 6, 1915, *Car Spotting Charges*, 34 I. C. C. 609.

To these assertions there are at least three answers:

First. The plants of these appellees were not "built and developed" in reliance upon Commission decisions concerning car spotting, for the Vandergrift plant of American Sheet & Tin Plate Company was in operation more than 30 years

ago—before the Commission decided any of the cases cited (R. 49), and performed its own spotting without allowance until 1917; the Allegheny Steel Company was in operation 29 years and performed its own spotting without allowance until 1930 (R. 202, 67); Pittsburgh Plate Glass Company (Ford City plant) was operating in 1903, and performed its own spotting with allowance until 1927 (R. 85); Weirton Steel Company was operating in 1909, and performed a part of its own spotting until 1921 (R. 209); West Leechburg Steel Company performed its own service without allowance until 1927 (R. 206), but the record does not show when the plant was built; Pittsburgh Plate Glass Company's Crystal City plant was built and operating in 1908 (R. 130).

Second. (a) The contention that the Commission's decisions have built up an inflexible rule of law to the effect that line-haul rates of carriers include the particular spotting services at appellees' plants or at all industrial plants is plainly inconsistent with the concession of appellees, the railroads, and the court below that the rates do not include "special or particular" or extraordinary spotting service.

(b) The Commission's decisions relied upon have been misconstrued by appellees and the railroad. While its decisions recognize the duty of carriers to perform "customary and reasonable" spotting service, they do not hold that the duty in-

cludes all spotting under all conditions. Indeed, they hold the contrary. Its general report in these proceedings analyzes and discusses the same case cited here, and concludes (R. 27):

> Certainly, it cannot be said that we have found that the transportation service which a carrier is obligated to perform under a line haul rate includes the placement of the car at the point of loading or unloading in all instances and under all conditions.

As stated, appellees and the railroads rely principally upon the report in *Car Spotting Charges, supra.* While the report in that case, as does the general report in this proceeding, recognizes that "customary and reasonable" delivery includes car spotting within the plants under normal and reasonable conditions, it does no more than that.

The suspended tariff proposing the spotting charges under consideration in that case "listed" in three classes the industries to which the charges were to apply, and one of the Commission's reasons for rejecting the tariff was (p. 615) that "the industries were arbitrarily selected." Moreover, the report declares (p. 618) that: "The line-haul rate, however, covers *only one placement of the car* for loading or unloading.

Appellees also cite (pp. 18–19) the decision in *National Malleable Castings Co.* v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537, in which the Commission found that the complainant was entitled to allowance for doing its own spotting, and referred to several

other cases in which it had "fixed reasonable allowances" for similar switching. But the report does not hold that allowances are due for all spotting under any conditions. It is decided upon "the nature of the industry" as disclosed by the particular facts at that plant. It was decided (1918) *after* the decision in *Car Spotting Charges, supra*, (1915), and it proves that the Commission's views in that case were the same as those expressed and applied in its general and supplemental reports in the instant cases. Indeed, the decision points out the difference between the facts upon which that allowance was held (November 26, 1918) to be justified and those upon which the Commission had, five months before, denied allowances to National Tube Company in *The Lake Terminal Case*, 50 I. C. C. 489 (June 11, 1918). The latter case is especially pertinent here: The report contains a sketch or map (opposite p. 490) disclosing a plant and general track arrangement not dissimilar to those portrayed by the maps of appellees' plants (see specially bound volume of exhibits); and, upon a lengthy discussion of "custom and practice", the Commission concluded (p. 496):

> It has not been the custom of carriers to spot cars without charge within industrial plants, as that term is here used, or to make allowances therefor out of their line-haul rates when the spotting is done by the industries themselves.

In this connection the Commission's decisions in *Pittsburgh Plate Glass Co.* v. *Director General*, 58

I. C. C. 81, and *Allegheny Steel Co.* v. *Director General*, 60 I. C. C. 575, are cited. But the report in the first case demonstrates the opposite of an inflexible rule of law or "custom and practice" concerning particular service at an individual plant. It states (p. 82) that prior to 1903 the Pennsylvania Railroad performed the switching "but the service became unsatisfactory and was a hindrance to the plant, and the complainant took it over with its own power." Thereafter, the service was performed (at least until the time the complaint was filed in 1920) by the Pittsburgh Plate Glass Company without compensation. In the second case the report and the record here show that for twenty-nine years the Allegheny Steel Company performed the spotting service without an allowance. Appellees and the railroads further suggest that because the Commission found unjust discrimination and issued alternative orders requiring its elimination in those cases, it may not now hold upon the facts of this record that it is unlawful for the railroads either to furnish the particular service or pay for it at those plants. This view is entirely erroneous, as shown by numerous decisions of this Court. *Warehouse Co.* v. *United States*, 283 U. S. 501; *Terminal Warehouse Co.* v. *P. R. R.*, 297 U. S. 500.

There is nothing in the language of any of the cases cited by appellees (pp. 17–18) and by the railroads (pp. 30–33), in which the Commission prescribed rates on various commodities, to support their contention that the spotting services in the

instant cases were included in the rates prescribed in those cases. Appellees and the railroads assume that, because the reports do not expressly state the contrary, every manner of spotting service was included in those rates. As the reports are silent on the subject, the only justifiable assumption is that "customary and reasonable" delivery was intended, and not more. Moreover, this argument of appellees goes to the "volume" of the rates. Even assuming that the volume thereof is excessive, that would not establish that spotting of the kind involved at these plants was included in the published rates.

Appellees (p. 20) and the railroads (pp. 6–7) contend that the Commission's recent refusal to prevent railroads from engaging in so-called "store-door" or "pick-up and delivery service" in connection with the transportation of less-than-carload freight (*Pick-Up and Delivery Service in Official Territory*, 218 I. C. C. 441), is inconsistent with its action in these cases. Even if the claimed inconsistency existed it would not nullify the orders in these cases. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658. But, the two types of service are wholly different and neither one furnishes a legal basis for the other. In that case, however, instead of selecting, as in these cases, a few large shippers from the general public and publishing tariff exceptions favoring them, the carriers there published general tariffs by which the pick-up and delivery service is open and available to all shippers.

Compare *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 510–512. Also, the Commission's authorization to the carriers to file the tariffs in that case was conditioned by the requirement that existing minimum rates of 30¢ per 100 pounds previously prescribed by it for less than carload traffic be increased to 45¢ per 100 pounds. Finally, the "store-door" delivery service is done in ordinary course of carrier operations, and does not include further separate and additional placements, subject to the convenience and direction of the shippers, within the *interiors* of stores and warehouses *after* the shipments have been *delivered* at the doors.

Appellees' brief cites (pp. 20–24) the testimony of 18 witnesses as proof of the claimed rule of law, or "custom and practice" of including spotting service in the line-haul rates "east of the Mississippi and north of the Ohio and Potomac", and the railroads cite only one (p. 31). But, as shown by the testimony quoted from Witnesses Eysman and Bihler (pp. 22–24), the testimony of all of the witnesses cited consists entirely of *general* statements and expressions of their *views, opinions,* and *understanding;* none of them discussed the *facts* upon which the orders in these cases rest; and, indeed, none of them dealt with any facts at all. And, while all of them stated it to be their "views" and "understanding" that the railroads were obligated under the line-haul rates to place the cars "in position" for loading or unloading, none of

them disagreed with the conclusion reached by the Commission that, in cases of obstruction, interruption, interference, or other such circumstances, the obligation ends at the point where such condition is encountered. That witness was chairman of a committee of railroads in official territory [2] which sought unsuccessfully in 1920 to promulgate uniform rules and practices with respect to spotting service. (Gov't. Br., pp. 39–41). And, on the Pennsylvania Railroad, of which the witness is an officer, there are 125 industries which perform their own spotting service without allowances, and 59 which receive allowances. (Gov't. Br., p. 37.)

Witness Beyers' testimony is cited, but on the Chicago & North Western Railway, of which he was vice president, there are 36 industries which perform their own spotting; of these, seven are paid allowances and 29 are not (see Gov't. Br., p. 39). That there is no such universal rule of law or "custom and practice" appears from the admitted fact stated in the Commission's report that spotting service in New England, the Southeast and extreme Southwest is not performed or paid for by the carriers.

The railroads take exception to the statement in the Commission's general report (R. 43) that generally the payment of allowances for services performed beyond points of interruption or interference within plants not only violates Section 6 of

[2] North of the Ohio and Potomac Rivers and east of the Mississippi River.

the Act but also "dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest." In its reports in these cases, the Commission found upon unquestioned evidence that the allowances to appellees constituted refunds from the rates in violation of section 6, and it follows as of course that such refunds are contrary to "efficient and economical management" and to the public interest. The railroads' argument against this general conclusion of the Commission leads to this: That they may "shrink" their rates in favor of particular shippers down to the point where the business of such shippers is unprofitable. And, apparently, that this must be established by the evidence.

CONCLUSION

The decrees of the District Court should be reversed.

STANLEY REED,
Solicitor General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.
ROBERT H. JACKSON,
Assistant Attorney General,
EDWARD M. REIDY,
Assistant Chief Counsel,
Of Counsel.

137414—37——4

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

In Equity, No. 557

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

In Equity, No. 558

EAST CHICAGO DOCK TERMINAL COMPANY

vs.

UNITED STATES OF AMERICA ET AL.

MEMORANDUM OPINION BY THE COURT

(January 23, 1937)

These actions were brought under 38 Statutes 219 (28 U. S. C. A., Section 41, subsections 45, 46, 47) and under the general equity jurisdiction of this court.

Cause No. 557 is an action to enjoin the Interstate Commerce Commission and the United

States of America from enforcing the terms of a cease and desist order, and for a decree adjudging the order void. Cause No. 558 demands the same relief and in addition thereto seeks to restrain and enjoin the respondent carriers in that case from taking action under the same order of the Commission.

The challenged order was promulgated by the Commission on May 14, 1935, and cessation of the condemned acts was ordered on or before July 15, 1935. Interlocutory injunctions *pendente lite* were issued and the causes were consolidated for hearing.

The East Chicago Dock Terminal Company, referred to for convenience as the Dock Company, for several years has been engaged in the operation of docks and a terminal at East Chicago, Indiana, which are served by the respondent carriers. Carload freight is shipped and received over those docks and to and from that terminal by numerous owners, shippers and receivers who are patrons or customers of the Dock Company, which likewise ships and receives carload freight to and from the docks. Those shipments move over the lines of respondent carriers in interstate commerce.

The Elgin, Joliet & Eastern Railway Company, referred to for convenience as the Elgin Railway, owns and operates a belt line of railroad around the city of Chicago, known as the outer belt. Pursuant to pertinent statutes, and rules of the Commission, it published tariffs with the Commission showing its rates for the transportation of goods between points therein named, in consideration of which it undertook to place cars at the respective points where the shippers and consignees desired

them placed for loading or unloading. In certain cases it found it desirable not to complete, itself, the placing of the cars at the desired points for loading or unloading, and in such cases it provided, in a properly published tariff, that it would pay the shipper or receiver of the freight a certain amount for performing the completion of such spotting service. Such a payment is commonly called an "allowance." This latter relationship existed between the Dock Company and the respondent carriers at the time this controversy arose, and had so existed for a long time. It was a practice which had become prevalent with certain railroads in parts of the nation, and had been approved by the Commission as well as by our highest courts.

In 1931 the Commission, of its own motion and without complaint from any railroad, shipper or consignee, entered upon a general investigation of the terminal service performed by railroad companies throughout the United States. As a result of that investigation, it made a general report in which it announced what it termed "principles." Among those, it declared that in the delivery or receipt of goods at a plant of an industry by a carrier, any service beyond a point on the plant where interference in the service might occur, or beyond a reasonably convenient interchange track, or in excess of the service required in making a simple placement or the equivalent of team track spotting, was unlawful.

The Commission also made a special report with respect to the Elgin Railway and the Dock Company, which contained the following pertinent language:

We find that the interchange tracks described of record are reasonably convenient points for the delivery and receipt of carload freight; that the transportation service for which the respondent carriers are compensated in their line-haul rates or switching charges begins and ends at said interchange tracks; that the service performed by the terminal company beyond those points is a plant service; and that by the payment of an allowance to the terminal company for service performed beyond the interchange tracks on interstate shipments, respondent carriers provide the means by which the industry enjoys a preferential service not accorded to shippers generally and refund or remit a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act.

This report was accompanied by the following order:

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by the Indiana Harbor Belt Railroad Company, the Elgin, Joliet and Eastern Railway Company, The Pennsylvania Railroad Company and the Baltimore and Ohio Chicago Terminal Railroad Company, to the East Chicago Dock Terminal Company, for performance by the latter of spotting service within its plant at East Chicago, Ind., and the Commission having on the date hereof, made and filed a report containing its legal conclusions with respect to the general situation presented, and also having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the

East Chicago Dock Terminal Company, which reports are hereby referred to and made a part hereof, and the Commission having found in said supplemental report that by the payment of said allowance, the above-named respondent carriers violate the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That the Indiana Harbor Belt Railroad Company, the Elgin, Joliet and Eastern Railway Company, the Pennsylvania Railroad Company ,and The Baltimore and Ohio Chicago Terminal Company be, and they are hereby notified and required to cease and desist on or before July 15, 1935, and thereafter to abstain from such unlawful practice.

The question here presented is whether the Commission had jurisdiction to enter this order.

Plaintiffs' argument is premised upon certain fundamental and primary rights of railroads which we concede:

1. They are permitted to make special contracts and to generally manage their interests upon the same principles as other trades and pursuits, subject, however, to the exceptions that their charges for transportation may not be unjust, unreasonable discriminatory or otherwise unlawful. 2. A railroad is entitled to initiate rates, and to adopt such policy of rate making as to it seems best, and it may undertake to transport goods over its railroad for any person upon agreed terms as expressed in published tariffs, subject to the limitations heretofore referred to.

Whether a published tariff rate is unjust, unreasonable or discriminatory is a matter which the Interstate Commerce Commission by law has been

empowered to determine under the existing facts and conditions. This determination is subject to review by the courts, except as to matters of fact which are supported by substantial evidence. From a perusal of the original Interstate Commerce Act of 1887 (24 Stat. 379) and its many amendments to date (49 U. S. C. A.), it is obvious that its principal objects were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line, and to abolish combinations for the pooling of freights. *Interstate Commerce Commission* v. *B. & O. Railroad Company*, 145 U. S. 263.

The publication of tariffs by the carriers is authorized by section 6 of the Act. Section 1 (14) provides that the Commission may, after hearing, establish rules, regulations and practices with respect to car service by carriers by railroad subject to the Act. The Commission, by section 12 (1), is authorized to inquire into the business management of all carriers subject to the Act, and to enforce the provisions of the Act. Section 13 (2) empowers the Commission to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, or concerning which any question may arise under any provisions of the Act, or relating to the enforcement of any of its provisions, and to make and enforce any order or orders in the case, or relating to the matter or thing con-

cerning which the inquiry is had. Section 15 (1) provides that before the Commission may make a cease and desist order, it must first reach the conclusion that a rate or practice is unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Act. Section 15 (13) provides that if the owner of property transported renders any service "connected with such transportation" the charge or allowance therefore shall be no more than is just and reasonable and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable maximum charge for such service, and fix the same by an appropriate order. Section 15 (14) provides that the enumerated powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of the Act.

It is first contended by plaintiff that the Commission's authority to make the order, which they deny, must be found, if at all, in Section 15 (1) of the Act which so far as pertinent to the questions here involved is set forth:

> Whenever, after full hearing, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers * * * or that any individual or joint classification, regulation or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this

> chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, * * * and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Under this section, it is obvious that before the Commission can act, it must first reach the conclusion that a rate or practice of the carrier is or will be unjust or unreasonable, unjustly discriminatory, unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Act.

Plaintiffs' argument assumes with certainty that the so-called spotting services involved in these controversies constituted transportation within the meaning of the act; that the railroads were lawfully bound to perform those services under their contractual obligations of the published tariffs, and that the tariff rates must be considered as just and reasonable compensation for such services, and un-

discriminatory until the Commission find to the contrary.

With this contention we are unable to agree. It is quite true that section 1 (3) of the Act, 49 U. S. C. A. 1 (3), provides that "The term 'transportation' as used in this chapter shall include * * * all services in connection with the receipt, delivery * * * and handling of property transported," but we cannot believe that it was the intention of Congress that a railroad having received a shipment or an order for empty cars and having transported either to the premises of the consignee or shipper ready for delivery, should, without fault on its part, be compelled to stand by for many hours and perhaps days in order to place the cars for loading or unloading at the particular place and at the particular time most advantageous to the needs of the consignee or shipper. It is true that the courts have held that the place of delivery means the point of loading or unloading, but we are convinced that this construction must be interpreted to mean that there shall always be accorded to the carrier a reasonably immediate access to the point of loading or unloading. Otherwise, the burden placed upon the carrier in many instances would be most inequitable. The growth of industries and the extension of plant areas with their networks of private railroad tracks where many cars are continuously needed for loading and unloading have made it necessary in many instances to have a switching engine continuously present. In comparatively recent years, therefore, the question has frequently confronted the courts and the Commission as to whether the switching done by an industry within its own plant, between the inter-

change or storage tracks and its loading or unloading platforms is work that the railroad is required to do as a part of transportation. In *American Sheet & Tin Plate Co. et al* v. *United States,* decided May 23, 1936, by a three-judge court in the Western District of Pennsylvania, it was stated, "There appears to be no exact formula that can be applied in answering this question. The most we can get from the decided cases is that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable."

In that case the court held that the spotting terminal switching service there involved was a transportation service which the railroads were by law required to perform. It further said, however, that while spotting service is transportation within the statutory definition and was a common carrier service up to certain limits, yet it did not "include special or particular spotting service as described in *New York Central & Hudson River R. R. Co.* v. *General Electric Company,* 114 N. E. 115, over an intricate system of trackage when the railroad is not permitted to enter to extend any 'spotting service' at all." The opinion then sets forth the following "typical circumstances" which would relieve the carrier from the duty of spotting: "(a) where an industry refuses to permit the railroad to enter upon the private industrial tracks; (b) where the physical condition and layout of the private industrial tracks will not accommodate the carriers' locomotive power without hazard or *excessive delay;* (c) the industry occupies large areas with many scattered plants, connected by an intricate system of industrial tracks and *used chiefly as*

industrial facilities." [Our italics.] This language clearly implies that there may be other circumstances closely analogous to the types mentioned which also might thus limit the carriers' duty. Obviously, the question propounded is one of fact which constitutes the basis for that court's rational conclusion that no exact formula can be applied in answering it.

The provisions of the Act, both express and implied, convince us that it is the duty of the Commission primarily to answer this question and its answer cannot be controverted by the courts, if it is based on substantial evidence. In the case just referred to, the court said, "* * * we find no circumstances which would relieve the carriers involved from the duty of 'spotting' the cars as a part of the transportation imposed on them by law." We think that statement is tantamount to saying that the Commission's factual conclusion to the contrary was not supported by substantial evidence. This being true, and not within our province to dispute, it logically follows that the court was correct in concluding as a matter of law that "the Commission was without power to prohibit entirely allowances for doing spotting services."

Many cases have been cited by the parties herein concerned, but they are not directly decisive of the question before us because of the varying respective conditions. We agree with Judge Schoonmaker and his associates in the case we have discussed in the statement that the applicable decided cases hold that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable.

While no exact formula can be applied, yet certain principles can be followed which will be both helpful and equitable as applied to all cases. We think it was within the province of the Commission under the Act to promulgate and enforce the principles which they announced, as hereinbefore referred to. They seem to us to be fair, and are sufficiently flexible in their application to cover all cases, and are calculated to approximate the rights and duties of the parties involved as nearly as it is humanly possible.

It is urged by plaintiffs, however, that the deliveries and the allowances therefor, which are the subject of the order, are both customary and reasonable. With respect to the custom, the record discloses that some carriers follow it and some do not; in some territories it is followed and in some it is not; with respect to some industries it is practiced by some carriers, and with respect to other industries it is not; some industries do their own plant switching, others do not; of those who do, some receive allowances therefor from the carriers, many more do not. Obviously, there was substantial evidence to support the conclusion that there was no general custom. Moreover, if any or all of the carriers, either voluntarily or by coercion, had submitted to the practice of rendering services under the guise of transportation services, which in reasonableness and in good faith could not be considered as a part of transportation, a continuation of that practice would never amount to a custom upon which the industries could claim a vested right of its continuance, for in that event the custom would be an unreasonable one, and any allow-

ance therefor would likewise be unreasonable, nor would the custom or the lack of reasonableness and validity be aided in any way by the proposals in the tariff publications.

It is true that the Commission made no finding or conclusion that the allowances for what it termed "plant services" constituted unreasonable compensation for such services. It was unnecessary to do so because it found that all such services were unlawful. Hence they were inherently unreasonable and unjust by reason of their unlawfulness. For the same reason, it was unnecessary for the Commission to specifically find that the rates were discriminatory.

The matter of findings of the Commission is covered by section 14 (1) of the Act: "Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made." In these cases no award of damages was made. The supplemental report finds all important basic facts, such as physical location and arrangement of plant, plant tracks, carriers interchange and other tracks, actual conditions of operations and all pertinent circumstances relative to the physical movement of cars. From these reported facts the Commission found that the spotting of cars within the plant was a plant service and was not transportation within the meaning of the Act. We think this was a compliance with the statute.

We are further convinced that the order is supported by substantial evidence, and that the evidence constitutes a sufficient basis for the Commission's conclusions. *Los Angeles Switching Case*, 234 U. S. 294; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444; *New York Central & Hudson River R. R. Co.* v. *General Electric Co., supra.*

It is to be noted that neither complaint alleges that the basic facts found are without support of evidence, or that they are not proved, or are inaccurately stated by the Commission. The alleged insufficiency of evidence is limited to the claim that there is no evidence to support the conclusions. We think this allegation has not been established. The argument in support of it is quite largely based on the premise that the obligation to spot cars is a legal one. As a general rule we accept that premise; however, we think it must always be subject to the limitations placed upon it by the reasonable principles promulgated by the Commission in the interpretation of the statute which defines "transportation." We think those principles do no injustice to the statute, and the order should be upheld.

The Commission's order is within its statutory authority; the findings are sufficient to support its order; the findings are supported by substantial evidence and the order should be sustained.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

In Equity, No. 4853

GOODMAN LUMBER COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled suit was brought under the Act of Congress of October 22, 1913 (38 Stat. L. 219, 28 U. S. C. A. Secs. 41, 45, 47, 47a) to enjoin an order of the Interstate Commerce Commission requiring the Minneapolis, St. Paul & Sault Ste. Marie Railway Company to discontinue payments to plaintiff for the switching and "spotting" of cars within its industrial plant at Goodman, Wisconsin. The case was heard upon a record consisting of the pleadings and the testimony and exhibits submitted to the Commission, and other evidence.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is a corporation with office and place of business located at Goodman in the Eastern District of Wisconsin. It there operates a manufacturing plant which is served by a common carrier engaged in interstate commerce.

2. Upon the Commission's own motion, it instituted an investigation "into practices of carriers affecting operating revenues * * * which * * * was divided into different parts." Part II of the proceeding related to the "spotting" of cars at industries. The Commission reported (209 I. C. C. 11, 15):

> Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at such further hearings. The principal questions to be determined, as indicated in the later notices, are as follows:
>
> 1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform.

3. After hearings the Commission, on May 14, 1935, issued its first, or "main" report (209 I. C. C. 11), in which it discussed generally the historical and legal aspects of the "spotting" service and reviewed and discussed generally the facts disclosed in the record before it.

4. The allowances paid by the railroad to the particular industry receiving them are generally published in tariffs, and are allowed and paid on the assumption that the spotting service is a "transportation" service, for performance of which the carriers receive payment in the line-haul rates and the industries are therefore entitled to compensation under the provisions of section 15 (13) of the Interstate Commerce Act. A tariff schedule covered the allowance paid to the plaintiff.

5. The Commission issued no order at the time of its main report, but announced certain principles concerning the payment of allowances to industries for performing spotting service at their industrial plants, or performance of such service by railroads in lieu of payment. (See Report.)

6. The testimony showed that numerous industries referred to in the proceeding are neither accorded plant-spotting nor paid allowances. (209 I. C. C. page 16.) The testimony shows that there is no uniform custom or practice of railroads or shippers generally over the country with respect to the performance of the "spotting" service or of payment of allowances therefor.

7. Following its main report the Commission issued separate supplemental reports and with each supplemental report it issued its order directing the carrier or carriers to cease and desist from paying allowances to the industry for performing its own spotting service or from performing the service for the industry without charge in addition to the line-haul rates. The specific order involved in the case at bar appears at 214 I. C. C. 84.

8. The allowance involved has been, and is, paid by the carrier to the Goodman Lumber Company

for the performance by the latter of spotting service within its plant and the plant of the Cliffs Chemical Company. The last-named company operates a plant lying to the south of the lumber company and some of the stockholders of the lumber company are also stockholders of the chemical company and one or more officers serve both companies, though the chemical company is not a subsidiary of the lumber company. Both industries are served by a system of tracks aggregating six miles in length located upon the property of the industries, the industries maintaining the tracks within the plants and furnishing the ties therefor and the railroad owning the metal. The carrier does not use these tracks to serve any other industry. There are also approximately six miles of additional tracks owned by the two industries which are used in plant service and to some extent in bringing in logs from the woods. There is very little inbound traffic over the carrier's line. Logs are hauled in by the lumber company. At the time of the hearing the daily outbound carloads ranged from one to five. The carrier has never maintained a switching engine at Goodman, all cars being set out and picked up by its local freight trains and crews on the interchange tracks hereinafter described.

Beginning June 1, 1912, under a verbal agreement, the carrier paid the lumber company an arbitrary amount of $200 per month intended to cover the expense of the lumber company in performing the terminal switching. Interchange was made on two tracks on the carrier's property just off its main line. This arrangement was canceled March 1, 1924, by the railroad upon the theory that the

payment of the terminal allowance was prohibited by a Wisconsin statute. Thereafter the carrier began delivering and picking up cars on four stub-end tracks on the property of the lumber company which are extensions of the tracks on which the traffic was interchanged prior to March 1, 1924. This practice continued until April 1, 1925, when the performance of the interchange service was resumed by the lumber company on the two tracks hereinabove mentioned, for the reason that the lumber company had requested a terminal allowance for which it agreed to perform all the switching. A cost study covering a two-week period in April, 1929, indicated that the interchange service cost the industry 95 cents for each loaded car. This study also showed that 25.48 percent was interchange switching and the balance intraplant switching. On November 12, 1929, a written agreement was entered into between the lumber company and the carrier, under which the lumber company was to perform the necessary service in moving the loaded and empty cars to and from points of loading and unloading both at its plant and that of the chemical company. This service was in excess of that previously performed by the carrier. On July 5, 1930, the allowance to the lumber company was published in tariff form. In making deliveries to the chemical company it was necessary to take traffic from the interchange points through a series of tracks of the lumber company to a point near its southern extremity, then back haul it to the chemical company.

Effective April 23, 1931, the allowance was canceled as to the intrastate traffic because of the enactment of a state statute. The payment of the 95-cent allowance was continued on interstate traf-

fic, the lumber company continuing to perform the spotting on both interstate and intrastate traffic. The lumber company refrained from requesting the carrier to do the spotting of intrastate traffic subsequent to April 23, 1931, because the operation of the carrier's locomotives within the plant the same time the company's locomotives were operating would be apt to occasion danger, delay and interference. The same switching service is performed on both interstate and intrastate shipments. The service for which the allowance is paid is in excess of ordinary team track or simple switch placement. Because of the operation of logging trains within the lumber company's plant, more danger and delay to traffic would be encountered if the carrier should undertake to perform the spotting as the locomotives would interfere with each other. The spotting service by the carrier would require the use of a switch engine whenever desired by either of the industries.

The Court finds that the above-stated findings of the Commission were supported by substantial evidence in the record before it, and concurs in and adopts the same.

9. The physical arrangement of the plaintiff's plant and that of the Cliffs Chemical Company, and the plant tracks in connection with the carrier's line are correctly shown in a blue print or map introduced in evidence before the Commission and marked Exhibit B–1, Volume of Exhibits no. 4, page 1.

10. Upon the evidence the Commission concluded that the existing line-haul rates of the carrier must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that

the stub-end interchange tracks described in the record and hereinabove constitute such reasonable points; that the transportation service which it is the duty of the carrier to perform for the lumber company and the chemical company under the line-haul rates begins and ends at said interchange tracks; that the movements of cars by the lumber company between said interchange tracks and points within its own plant and that of the chemical company are industrial services which it is not the duty of the carrier to perform; that by the payment of the allowance for the service performed on interstate shipments beyond said stub-end interchange tracks; the carrier provides the means by which the lumber company enjoys a preferential service not accorded to shippers generally and refunds or remits a portion of the rates and charges collected and received by it as compensation for the interstate transportation of property in violation of section 6 (7) of the Interstate Commerce Act, which conclusions the Court finds are supported by substantial evidence and in which the Court concurs.

11. The Commission found that the transportation included in the published rates begins and ends at the said interchange tracks at Goodman, that the "spotting" service between those tracks and points within the plants is plant service and not transportation covered by the line-haul rates, and that by paying the allowance for the "spotting" service for said industries the carrier provides the means by which the plaintiff enjoys a preferential service and refunds or remits a portion of the published rates.

12. The Court finds that the evidence received by the Commission supports the findings made by the Commission.

CONCLUSIONS OF LAW

The Court finds:

1. The Commission's order is within its statutory authority.

2. The findings made by the Commission are sufficient to support its order.

3. The continuance of payment to the plaintiff under the circumstances would have been a discrimination.

4. The complaint should be dismissed.

(Signed) EVAN A. EVANS,
United States Circuit Judge.

(Signed) F. A. GEIGER,
United States District Judge.

(Signed) JOHN P. BARNES,
United States District Judge.

DECEMBER 4, 1936.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

In Equity, No. 4988

A. O. SMITH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY (HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HEIGHT, TRUSTEES), DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Upon the evidence before it the court makes the following findings of fact:

1. The plaintiff, A. O. Smith Corporation, is a corporation with its principal operating office and plant at Milwaukee, Wis., where it is now and has for many years been engaged in the manufacture of automobile gear frames and other heavy metal articles. In the conduct of said business it receives and ships large amounts of material and finished articles by rail, in carloads. It brought this suit under the Act of Congress of October 22, 1913, to enjoin and set aside an order of the Interstate

Commerce Commission entered May 19, 1936, in a proceeding entitled A. O. Smith Corporation Terminal Allowance, Ex Parte 104, Pratices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, wherein the Commission ordered the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (co-defendant herein) to cease and desist from paying to plaintiff an allowance for the movement of cars beyond certain interchange tracks, described in the record herein, and the spotting thereof within the plant of said plaintiff. A copy of said order is attached to the petition (Appendix A).

2. The proceeding of the Interstate Commerce Commission is Part II of an investigation instituted July 6, 1931, upon the Commission's own motion "into practices of carriers affecting operating revenues or expenses," which for convenience was divided into different parts. Hearings were held in said proceeding pursuant to notice given by the Commission and much testimony and many exhibits were received, including evidence as to the practices of the railroads throughout the country with respect to the delivery of carload shipments of freight. The Commission also received evidence as to the plaintiff's industrial practices, the character and arrangement of its plant at Milwaukee and of the railroad tracks entering and within said plant, and the manner in which cars, loaded and for loading, were delivered to and taken from said plant. Said evidence also disclosed the history of the spotting service performed at the plaintiff's said plant and of the allowance therefor. An official of the plaintiff company appeared and testified at said hearing.

3. Following said investigation the Commission, on or about May 14, 1935, made and published its report (209 I. C. C. 11). On or about May 19, 1936, the Commission issued a supplemental report in said proceeding, the same being designated the "Fifty-third Supplemental Report," wherein the Commission dealt specifically with the terminal or "spotting" services rendered at the plaintiff's plant in Milwaukee aforesaid, and at the same time made and entered an order against the defendant railroad company, said supplemental report being attached to the petition herein as Appendix B.

4. The evidence before the Commission was sufficient to support the findings of the Commission and its order.

CONCLUSIONS OF LAW

The court concludes, as matters of law, that—

1. The Interstate Commerce Commission acted within its legal powers in instituting and conducting the investigation and proceeding which resulted in the order sought to be set aside herein.

2. The Commission's order is supported by substantial evidence.

3. The Commission was empowered to make the order complained of.

4. The findings of the Commission support its order.

5. The complaint should be dismissed.

Dated: December 5, 1936.

(Signed) EVAN A. EVANS,
United States Circuit Judge.

(Signed) F. A. GEIGER,
United States District Judge.

(Signed) JOHN P. BARNES,
United States District Judge.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

In Equity, No. 2856

KOPPERS COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, NORTHERN PACIFIC RAILWAY COMPANY AND GREAT NORTHERN RAILWAY COMPANY, RESPONDENTS.

MEMORANDUM OPINION

(April 1, 1937)

BELL, District Judge, delivered the opinion of the Court.

This is an action in equity brought by the Koppers Company, petitioner, against United States of America, Interstate Commerce Commission, Northern Pacific Railway Company and Great Northern Railway Company, respondents, to enjoin, annul and set aside an order of the Interstate Commerce Commission entered June 24, 1935, in a proceeding designated Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, which required the respondent carriers to cease and desist, on or before August 15, 1935, from paying al-

lowances to the petitioner for certain alleged terminal services. The cause was first heard on an application for an interlocutory injunction before a three-judge court composed of Honorable John B. Sanborn, United States Circuit Judge, Honorable Wilbur F. Booth, United States Circuit Judge, and Honorable Robert C. Bell, United States District Judge, under 28 U. S. C. A., Section 47, which was denied (11 F. Supp. 467). The cause was tried before the same court October 12 and 13, 1936.

Mr. John B. Keeler and Mr. Albert A. Mattson of Pittsburgh, Pennsylvania, and Mr. George W. Morgan and Messrs. Kellogg, Morgan, Chase, Carter & Headley for the petitioner.

Mr. Elmer B. Collins, Special Assistant to the Attorney General for the United States,

Mr. Edward M. Reidy for the Interstate Commerce Commission,

Mr. M. L. Countryman, Jr. for the Northern Pacific Railway Company,

Mr. R. J. Hagman for the Great Northern Railway Company, for the respondents;

Mr. Herman Mueller, Jr. for the National Industrial Traffic League, Intervenor.

The general report of the Commission in Ex Parte No. 104, will be found in 209 I. C. C. 11, and the supplemental report pertaining exclusively to the industry of the petitioner will be found in 209 I. C. C. 421 and following our opinion in 11 F. Supp. 470.

The petitioner contends: (1) that the findings of the Commission are not sufficient to sustain the order, (2) that the findings of the Commission are not supported by substantial evidence, and (3) that

the Commission abused its discretion in denying its petition for a rehearing.

The Commission contends that the reports and order were made after a full hearing, that they are based on substantial evidence and in all respects are regular, proper and lawful.

The carriers neither admit nor deny the reports and the order, but allege that in compliance with the order each of them filed a tariff effective August 15, 1935, providing for the withdrawal and cancellation of the allowances. They state that they would have continued in force their tariffs providing for the allowance except for the order of the Commission and that they are willing to reinstate such allowances if the order of the Commission is held unlawful.

The order, in effect, deprives the petitioner of an allowance of one dollar per car by the carriers for services rendered by it in switching and spotting cars within its plant at St. Paul, Minnesota. The Commission found that the services were not for the carriers, but were plant services performed by the petitioner for its own benefit and convenience and that the allowances were in violation of the Interstate Commerce Act, 49 U. S. C. A., Section 6 (7).

The interlocutory injunction was denied on the ground that the evidence on which the reports and order of the Commission were based was not before us and that we therefore did not have the power to question the findings of fact made by the Commission. We held that the order of the Commission was within the scope of its general powers, that it was made after a full inquiry, and that it is entitled to great respect as it represents the opinion

of a body of experts on matters within their special knowledge and experience.

The facts presented by the record are comparatively simple. The petitioner is and continuously since 1918 has been engaged in manufacturing coke at St. Paul, Minnesota. Its plant occupies a space more than 4,000 feet in length, more than 800 feet wide at the east end, and gradually diminishes in width to a narrow strip at the west end. The plant trackage is three and one-half to four miles in length, of standard gauge, has maximum curves of eighteen degrees, and leads to approximately twenty points, scattered throughout the plant, where freight cars are spotted for loading and unloading.

Petitioner's plant is served by the two respondent carriers, both of whom maintain yards on lands adjacent to and north of the west end of the plant. The Great Northern yard consists of three tracks from 1,000 to 1,100 feet in length, and the Northern Pacific yard consists of four tracks of approximately the same length. These tracks converge toward the railway entrance to the plant where one track from each yard connects with a tract owned by the petitioner. The carriers deliver ingoing freight cars on their respective tracks immediately outside the entrance to the plant where they are received and moved by the industry with its own power as desired to points within the plant for loading and unloading. Outgoing freight cars are moved as desired by the industry with its own power through the entrance of the plant into the yards of the carriers and there received by them. In other words, the yards or tracks of the carriers are used for interchange purposes and are desig-

nated in the record as "interchange tracks." The carriers have never performed the switching service for which an allowance has been made to the petitioner. The locomotives of the carriers do not enter the plant property. The switching between the interchange tracks of the railway companies and the points in the plant for loading and unloading is done by the industry with its own power and switching crews.

The industry receives an average of 25 carloads of freight daily, 95% of which is coal. A portion of the coal is switched to coke ovens and the balance to stock piles. That which goes to the ovens must be placed and unloaded at such times as it can be received in the manufacturing operations. Outbound shipments, mostly coke, fluctuate from 15 to 90 carloads daily.

It requires sixteen or more hours per day under normal conditions for a switch engine to perform the required service and from four to eight hours, depending on the volume of business, in moving cars to and from the interchange tracks. The operation of the carriers' locomotives within the plant for the purpose of spotting cars while the industry engine performs the intraplant service would be impracticable.

The average distance from the interchange tracks at the entrance of the plant to loading and unloading points is 1,200 to 1,400 feet, and to the most distant loading and unloading points is nearly 4,000 feet. Track scales are located at the railway entrance to the plant where the interchange tracks connect with the plant tracks. Both loaded and unloaded cars are weighed by the petitioner primarily for its own benefit, but at times use is made

of the weights by the carriers for fixing transportation charges.

From 1918 when the industry commenced operation, until February, 1922, the switching service was performed by the industry and no allowance was made. The payment of an allowance was suspended from March 1, 1927, to June 15, 1929, because there was a question as to the legality thereof due to the fact that there were no published tariffs covering such payments. Tariffs providing for a terminal service allowance of one dollar per loaded car were published and were in effect from June 15, 1929, to August 15, 1935, when the allowance was discontinued as a result of the order of the Commission herein involved.

The foregoing are the facts substantially as found by the Commission and there is little or no dispute as to their accuracy or that they are supported by substantial evidence. It is the conclusions of the Commission that meet with objection. The conclusions are as follows:

> Under the governing rules the carriers' duty with respect to delivery terminates at the point of interruption, in this case, the scales. In other words, respondents are prevented from performing the spotting service within this plant in an uninterrupted movement at their ordinary operating convenience, and have therefore, fulfilled their common-carrier obligation under the line-haul rates by the delivery and receipt of cars on reasonably convenient interchange tracks. * * *
>
> In fact, the spotting-service must be coordinated with plant operations, and to attain this objective the switching must be per-

> formed at such times as will meet the needs of the coke company. No obligation rests upon respondents to perform service beyond the agreed points of interchange solely at the convenience of the industry. * * *
>
> We find that the respondents have complied with their obligations under the interstate line-haul rates by the delivery and receipt of carload freight on the interchange tracks described of record; that the service beyond the interchange tracks is a plant service; and that by payment of an allowance to the coke company for the service performed by it beyond the interchange tracks on interstate shipments, respondents provide the means by which the coke company enjoys a preferential service not accorded to shippers generally, and refund or remit a portion of the rates or charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act (49 U. S. C. A., § 6 (7).

The conclusions of the Commission contained in the first two paragraphs above quoted very properly may be designated conclusions of fact or of ultimate fact. The scales at the railway entrance or gateway of the plant were found to be the "point of interruption," not merely because cars are weighed at the scales, but because the trackage of the carriers is on one side of that point and the trackage of the plant is on the other side, and because up to that point the carriers can move cars without interruption and beyond that point the movement of the cars must be coordinated with the operations of the plant. After arriving at these conclusions of fact, the Commission found that transportation under the line-haul rates ended

with the receipt and delivery of cars on the interchange tracks, that the switching and spotting of cars on the plant trackage beyond the scales is a plant service that the carriers are not under an obligation to perform, and that any allowance to the petitioner for the performance of such service is discriminatory and unlawful.

The term "transportation" under Section 1 (3) of the Act, 49 U. S. C. A. 1 (3), includes all services in connection with the receipt, delivery and handling of property transported. Transportation includes delivery and whatever is necessary to complete delivery the carrier must perform. It is for performing this service that the carrier is paid under line-haul rates. If the carrier fails to make delivery and the consignee through its own instrumentalities completes the delivery, an allowance is proper. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274. When the carrier ends transportation by delivery, no allowance is due for service performed by the consignee beyond the point of delivery and an allowance under such circumstances would constitute an unlawful rebate. *Act of February 4, 1887*, 24 Stat. 379; *Act of February 19, 1903*, 32 Stat. 847; *Act of June 29, 1906*, 34 Stat. 584. The fundamental decisive question in this case is whether the spotting of cars for loading and unloading within the plant of the petitioner is a part of the transportation required of the carrier under line-haul rates, and this question depends on whether the service is customary and reasonable. *New York Central & Hudson River Railroad Company* v. *General Elec-*

tric Company, 219 N. Y. 227; 114 N. E. 115, certiorari denied, 243 U. S. 636.

In our opinion on the application for the preliminary injunction, we did not finally determine the question as to the sufficiency of the findings, but we said:

> It would seem that the main, essential, ultimate, basic fact to sustain the order of the Commission in this case is that the transportation service terminated at the gateway of the petitioner's plant. If that finding of the Commission is sustained by the evidence, then it would follow that the allowances provided for in the tariffs were gratuities paid to the shipper, and clearly preferential. * * *

The conclusions and findings of the Commission are definite, explicit, contain the facts decisive of the issues involved in the proceeding, and in our opinion are ample to sustain its order. Therefore, the first contention of the petitioner must be denied.

We now come to the more serious question as to whether the findings are supported by substantial evidence. Courts should exercise the greatest caution in disturbing the findings of an experienced administrative body made in the performance of its duties as prescribed by law. The credibility of witnesses, the weight of the evidence and the conclusions to be drawn therefrom in matters before the Interstate Commerce Commission are for it to determine; and its findings of fact will not be reviewed by the courts if supported by substantial evidence. *Merchants Warehouse Company* v. *United States*, 283 U. S 501; the *Assigned Car*

Cases, 274 U. S. 564; *Virginian Railway Company* v. *United States*, 272 U. S. 658; *Western Papermakers' Chemical Company* v. *United States*, 271 U. S. 268. In this connection the court in the Assigned Car Cases said:

> It is not for courts to weigh the evidence introduced before the Commission, *Western Papermakers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 471; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States* v. *New River Co.*, 265 U. S. 533, 542. These are matters left by Congress to the administrative "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454.

A drawing of the plant and interchange tracks, exhibit B–8, is in evidence. It shows the location of the plant tracks, the buildings, coke ovens, coal piles, storage bins, structures of various kinds, and certain equipment of the industry; also the location of the interchange tracks of the carriers on adjacent property. It reveals a system of switching tracks and points for loading and unloading cars, a system that may be used for the continuous movement of a large quantity of coal into the plant and coke out, and that undoubtedly is used chiefly for industrial facilities. The exhibit presents physical facts showing a situation where several miles of tracks have been constructed and are main-

tained within the confines of a plant to serve an industry of considerable proportions and not to serve as railway terminals; and, furthermore, that the tracks of the carriers were constructed and are maintained on adjacent property to serve as railway terminals or interchange tracks for the benefit and convenience of the industry. While the size of the industry is not decisive of the question, the interruptions at a plant of extensive proportions with an intricate switching system for intraplant service necessarily would be greater than at the ordinary spur or siding.

The size and physical arrangement of the plant, the extent of its trackage, the situation governing the switching, the convenience and adequacy of interchange tracks are important basic facts to be considered in the determination of the question as to whether switching and car-spotting service is a part of the transportation required of carriers under line-haul rates or is a plant service. *New York Central & Hudson River Railroad Company* v. *General Electric Company,* supra; *Merchants Warehouse Company* v. *United States,* supra; *Los Angeles Switching Case,* 234 U. S. 294.

The Superintendent of Terminals of the Great Northern testified that the extent of the trackage in the plant is about 20,000 lineal feet and that there are twenty spotting points, that it would require the constant attention of a switch engine sixteen hours a day to perform the switching service required, that there is intraplant switching to be done, that by cooperation the interruption could be reduced to a minimum, that classification or a segregation of cars of various kinds of coal is necessary so that they may be spotted at the proper

unloading hoppers or stock piles, that the process of classification would result in interruption. This witness, in part, said:

> Q. Are we to understand that answer that this industrial operation must be fed in accordance with the requirements of the industry and their requirements in the spotting of the cars?
>
> A. I would say that to some extent, a large extent, that is true.
>
> Q. Would you say that if your company undertook to perform that service, having in mind both the inbound traffic and the outbound traffic, that it would necessitate the constant placement of a switch engine at the industry to take care of the inbound and the outbound loads?
>
> A. My study did not indicate that it would be necessary to have an engine constantly in attendance, but that to handle the plant properly and all the requirements in connection with it, that approximately 16 hours of the day, it would require the constant attendance of a switch engine service.
>
> Q. About what is the volume of the outbound traffic, expressed in numbers of cars per day?
>
> A. They would run from 15 cars to 90 cars a day during the year. It varies, of course. The winter time is the heavier business, in our experience.
>
> * * * * *
>
> A. Well, to take over the plant as it is today it would take at least four hours' time of an engine, but when this plant is operating continuously I am certain we would find it necessary to serve the plant at least twice a day and that would mean a total of 8 hours and not include any intraplant switching.

Q. And in addition to your serving that plant for eight hours a day with this engine, it would be necessary for the plant to have an engine of its own to do its intraplant switching?

A. Yes, sir, it would.

The Superintendent of petitioner's plant testified as follows:

Q. This service of placing the cars in positions accessible for loading and unloading at the plant, is that performed by the industry at the present time at times throughout the day that will meet the convenience of the industry?

A. Yes, sir.

Q. Or may it be done whenever the engine is ready to do it?

A. I might state this: We have a constant flow of coal and as a result we have a constant flow of coke. If we have 25 cars of coal today and we make about 30 cars of coke a day, the coal is unloaded in an 8 hour period, and the coke is made in a 24 hour period. We have bin capacity sufficient for the coke, so that probably you would hold up four hours' production.

Q. That is to say if the railroad power entered your plant to do that work, they might lack a set-up in the going that might hold up your plant moving for four hours, is that what you mean?

A. Yes, they could do it, provided they got the proper grade of coal at the right time, they could do it in two hours.

Q. That coal would have to be classified and graded according to the production?

A. Yes, sir.

Q. Your own industrial power does that grading at the present time?

A. Yes, sir.

* * * * *

Q. And if both railroads undertook to serve your plant and spot their own cars, that is, the Great Northern Power spot the Great Northern traffic and the Northern Pacific spot the Northern Pacific traffic and your industry engines performed the intra-plant service, how would that work out?

A. That would be like a crazy-quilt.

Q. It could not be done?

A. It could not be done. There would have to be an arrangement, or we would have to get all cars to use only one road.

* * * * *

Q. Why do you weigh the empty cars?

A. We find there is a very great difference from the stenciled weight and the light weights that we have. They run as much as four or five hundred pounds different.

Q. You do not do that for the convenience of the railroad, do you?

A. No, sir.

Q. That is for your own convenience?

A. For the convenience of ourselves and our customers of coke.

Q. So you weigh the inbound cars for your convenience and not for the convenience of the railroads?

A. I would say for our convenience on loss of weight, most of it is for our own convenience.

Q. Are all your cars weighed inbound?

A. Yes, sir.

It is significant that the Superintendent of the petitioner's plant testified that "an arrangement" would be necessary to enable the carriers to render

the service now performed by the industry. In effect, he admitted that the situation in the plant is such that the carriers cannot enter it to deliver and receive cars except in accordance with an arrangement, evidently meaning some agreed plan of coordination of switching and plant operations. Whatever the plan might be, it necessarily would require the supervision of some one empowered to direct operations; and naturally, the management of the plant would be the logical authority in order that the plant might be conducted in an orderly, systematic manner. In short, plant operations must be under unified control. Where an arrangement for the carriers to perform the service under the supervision of the industry is necessary, so as to make it practicable for them to perform it, the switching loses its character as a terminal service and becomes a plant operation. Carriers, to perform the full measure of their duty under line-haul rates, are not required to stand ready with a switch engine at all times to answer the call of an industry to spot cars within its plant.

The testimony might have been more elaborate, more in detail, more conclusive; indeed, the Commission might have arrived at a different conclusion, but that is not the question before us. *Florida, et al.* v. *United States et al.*, 282 U. S. 194. The record is not barren of testimony to support the findings of the Commission; to the contrary, there is very substantial evidence to support them. It is obvious from the physical facts contained in exhibit 'B, from the oral testimony above quoted and from much other evidence in the record that there is such interruption, due to the classification of the coal, the weighing of the cars, the intraplant

switching, the necessity of the co-ordination of terminal and plant switching under the supervision of the industry, as to show very clearly that the service is not a part of the transportation required of the carriers, but is a plant operation. Therefore, the second contention of the petitioner must be decided against it.

It is urged that the Commission abused its discretion in denying a petition for rehearing. The supplemental report of the Commission dealing with the petitioner's plant was made June 24, 1935. A "petition for reconsideration" was filed with the Commission which, in effect, sought a reversal on the record already made and which was denied. A "petition for rehearing, reconsideration, further hearing and modification of the order in view of changed conditions" was filed with the Commission on March 12, 1936, and this petition was denied on May 4, 1936. The original bill was filed in this court August 7, 1935, when the petition for "reconsideration" was pending before the Commission. The preliminary injunction was denied August 14, 1935. On September 18, 1936, after the second petition had been denied by the Commission, a supplemental bill was filed in this court alleging the facts pertaining to the denial of the petition for a rehearing by the Commission. However, abuse of discretion by the Commission is not alleged.

To show a "changed condition" it was alleged in the petition to the Commission that (1) the practice of weighing inbound cars had been discontinued, (2) the weighing of outbound cars was continued solely for the benefit of the carriers and might be done by the carriers, (3) that by coopera-

tion between the petitioner and the carriers interference could be eliminated in the switching of cars from the interchange tracks to points within the plant if the carriers performed the service, (4) that if the carriers performed the service they would not be required to "feed" the cars to the plant to meet the requirements of the operations, (5) that the carriers could perform the service without interference, and (6) that to deprive the petitioner of such service would be a discrimination against it and a preference to other industries. Manifestly, this petition consisted largely of conclusions, arguments and proposals.

After the hearings had been held before the Commission, the proceeding closed, the case submitted, the reports made, after the petition for a "reconsideration" had been denied and after suit had been commenced in this court, the petitioner then asked that the proceeding before the Commission be reopened; and, in effect, that it be allowed a new trial on its representation that it could show a state of facts that would entitle it to more favorable results. Such procedure would not be conducive to the termination of litigation and it is not the procedure in the courts or before the Interstate Commerce Commission. The petitioner does not contend that it did not have a full, fair hearing or that it was deprived of an opportunity to present its testimony. The granting or denial of the petition for a hearing is a matter for the discretion of the Commission, *49 U. S. C. A., Sec. 16a;* and we are convinced that there was not such abuse of discretion as to justify setting aside the order. *United States* v. *Northern Pacific Railway Company*, 288 U. S. 490.

It has also been contended on behalf of petitioner that the carriers are required to perform such spotting service here involved by a universally established custom and usage. There is no such custom and usage under the facts presented by the record in this case; indeed, the evidence is decidedly to the contrary. In analyzing the decisions bearing on this phase of the controversy, it is necessary to note the decisive question of fact, always involved, as to the point where transportation ends and industrial operations begin, pointed out in the *Los Angeles Switching Case, supra,* and the *New York Central & Hudson River Railroad Company* v. *General Electric Company, supra.* When this is done it is obvious that only in exceptional instances and in comparatively limited areas have certain industries been favored with allowances.

The injunction is denied and the petition dismissed for want of equity.

BOOTH, Circuit Judge, concurs in the foregoing opinion.

SANBORN, Circuit Judge, dissenting.

The issue in this case, reduced to its simplest terms, is whether, under the evidence, the service of switching and spotting cars within the plant of the petitioner is a terminal service which the carriers are obligated to perform under their line-haul rates, or whether it is a plant service not covered by the line-haul rates. The Interstate Commerce Commission is of the opinion that it is a plant service, and the industry believes that it is a reasonable and customary terminal service. It may be conceded that if, under the evidence upon which the Commission's findings and order are based, this question of

fact is doubtful or debatable, rather than purely speculative, the Commission's order should stand. I am unable to convince myself that the evidence justifies a finding or inference that there are interferences or obstacles to the performance by the carriers of switching and spotting service for the industry which converts what would otherwise be a terminal service into a plant service. It seems to me that the evidence tends to establish that the performance by the carriers of terminal service for the industry would not be any more burdensome than similar services performed by these carriers for other smaller industries connected with the carriers' lines by the spur or industrial tracks. It is not my understanding that a carrier is entitled to spot cars at any industry at the carrier's sole convenience. Obviously, spotting service performed by a carrier on an industry track which serves two or more industries or which is used by two or more carriers must be done under some arrangement between the carriers and industries. Where such an arrangement is practical, the fact that a carrier is obliged to consult the convenience of an industry or that of another carrier in delivering and spotting cars, should not ordinarily excuse the performance of a terminal service which is covered by the line-haul rates. Demurrage rules take care of unreasonable delays in accepting delivery. While the evidence indicates that this industry weighed cars handled by it after they were received from the carriers, there is no evidence that if the carriers had been required to perform the terminal service, the industry would have insisted upon the cars being weighed by them or would have refused to

compensate them for weighing such cars as were required to be weighed. The fact that the Interstate Commerce Commission denied a rehearing, asked for by the petitioner because weighing of cars in the plant had been dispensed with, is some indication that the weighing of cars was not regarded by the Commission as a matter of controlling importance.

If the evidence, taking that view of it most favorable to the Commission, is as consistent with the hypothesis that the terminal services which the petitioner insists that the carriers must either perform or pay for are reasonable and customary terminal services covered by the line-haul rates, as with the hypothesis that they are plant services not covered by the line-haul rates, it (the evidence) tends to establish neither hypothesis, but leaves the question in the realm of conjecture. *Ewing* v. *Goode* (C. C. S. D. Ohio) 78 F. 442, 444; *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Stevens* v. *The White City*, 285 U. S. 195, 204; *Eggen* v. *United States* (C. C. A. 8), 58 F. (2d) 616, 620; *Deadrich* v. *United States* (C. C. A. 9), 74 F. (2d) 619, 622; *Claywell* v. *Inter-Southern Life Ins. Co.* (C. C. A. 8) 70 F. (2d) 569, 571; *Svenson* v. *Mutual Life Ins. Co.* (C. C. A. 8), 87 F. (2d) 441, 443.

I think that the order of the Commission should be enjoined for the sole reason that the evidentiary base on which it rests is too weak to support it.

U. S. GOVERNMENT PRINTING OFFICE 1937

FILE COPY

FILED
APR 2 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

NO. 734

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants

v.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY and PITTSBURGH PLATE GLASS COMPANY, ET AL.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR APPELLEES.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Pittsburgh, Pa.,

Counsel for Appellee, American Sheet & Tin Plate Company.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Chicago, Ill.,

Counsel for Appellees, Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company.

Of Counsel:
WILLIAM W. COLLIN, JR.,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

INDEX.

	PAGE
Opinion Delivered in the Court Below	1
Counter Statement of the Case	2
Summary of Argument	5
Argument	7
I. The relative status of the Carriers and the Commission	7
II. The placement of cars at reasonably convenient and accessible places for loading or unloading within industrial plants, including those of Appellees, is a common carrier service to which shippers are entitled, and which the carriers are in duty bound to perform, and is a transportation service under the Interstate Commerce Act. Certain extraordinary circumstances, not present in these cases, may relieve or limit this obligation (Conclusion of Law No. 1 of the Court Below (R. 573))	9
A. The spotting service is a transportation service under the Interstate Commerce Act	9
B. The existing rate structure has been erected on the assumption that the carrier is obligated to perform the spotting service	11
The importance of custom and practice	12
Prior views of the Commission	14
Testimony of the witnesses	20

PAGE

C. The carrier is obligated to furnish the transportation service included in the rate 24

D. If the spotting service were not included in the published freight rates, the carriers' tariffs were required to so specify 29

E. The extraordinary circumstances which will relieve the carriers of this duty are not here present..... 30

F. The findings and conclusions of the Court below should be sustained... 34

III. The carriers could lawfully employ Appellees to perform the spotting service on the carriers' behalf and pay reasonable compensation therefor 35

IV. An allowance to a shipper when provided in a published tariff of the carrier cannot be considered as a rebate or to violate section 6 of the Interstate Commerce Act... 40

V. To support a cease and desist order by the Commission it must make the necessary quasi jurisdictional findings of fact, that the rate or practice complained of was unreasonable, unjustly preferential, unduly discriminatory or otherwise unlawful, or the order is void. No such findings were made in these cases 44

VI. Reply to brief for Appellants 52

VII. Conclusion 59

CASES CITED.

PAGE

Adams v. Mills, 286 U. S. 397, 409; 76 L. ed. 1184, 1193 (1932) 13

Allegheny Steel Co. v. Director General, 60 I. C. C. 575 18

Allowance for Terminal Switching at DeKalb, Illinois, 165 I. C. C. 27 19

American Sugar Refining Co. v. Delaware, L. & W. R. Company, 207 Fed. 733, 744 43

Associated Jobbers of Los Angeles v A. T. & S. F. Ry. Co., 18 I. C. C. 310, 314 (1910) 16

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 198; 79 L. ed. 1382, 1388 (1935) .. 10, 13, 47

Beaumont, Sour Lake & Western Ry. Co. v. Magnolia Provision Company, 26 Fed. (2d) 72 (1928) 42

Car Spotting Charges, 34 I. C. C. 609 (1915) 11, 14, 15, 16, 19, 22, 31, 32, 33, 55, 59

Cent. R. Co. of N. J. v. U. S., 257 U. S. 247; 66 L. ed. 217 (1921) 52

Cement in Trunk Line Territory, 174 I. C. C. 224 (1929) 18

Chesapeake & Ohio Ry. Co. v. Westinghouse, Church, Kerr & Co., 270 U. S. 260, 265; 70 L. ed. 576, 578 (1926) 10, 27

Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184, 197; 40 L. ed. 935, 939 (1896) 8

Coal, Bituminous, Ex River, etc., 197 I. C. C. 617 (1933) 17

Coke Between Points in Central and Illinois Territories, 194 I. C. C. 640 (1930) 17

Consolidated Stone Cases, 200 I. C. C. 65 (1934) ... 17

Davis v. Portland Seed Company, 264 U. S. 403, 425, 68 L. ed. 762, 769 (1924) 42

PAGE

Eastern Class Rate Investigation, 164 I. C. C. 314 (1930) 17

East Chicago Dock Terminal Co. v. United States. (Not yet reported) 58

East Tennessee V. & G. R. Co. v. Int. Com. Com., 181 U. S. 1; 45 L. ed. 719 (1901) 52

Elgin, Joliet & Eastern Ry. Co. v. United States (Not yet reported) 58, 59

Florence Pipe Foundry & Machine Co v. Pennsylvania R. R. Co., 188 I. C. C. 215 (1932) 39

General Electric Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237 (1908) 30, 33, 34

General Petroleum Investigation, 171 I. C. C. 286 (1931) 17

Industrial Railway Cases, 29 I. C. C. 213 (1914) ... 14

Industrial Sand Cases, 1930, 188 I. C. C. 99 (1932) .. 17

I. C. C. v. Atchison, T. & S. F. Ry. Co., 234 U. S. 294, 308-312; 58 L. ed. 1319, 1327 (1914) 10, 34

I. C. C. v. Baltimore & Ohio Railroad Company, 43 Fed. 37 (1890); 145 U. S. 263; 36 L. ed. 699 (1892) 47, 51

I. C. C. v. Chicago G. W. R. Co., 209 U. S. 108, 118; 52 L. ed. 705, 712 (1908) 7

I. C. C. v. Diffenbaugh, 222 U. S. 42; 56 L. ed. 83 (1911) 37, 54

I. C. C. v. Louisville & N. R. Company, 73 Fed. 409, 419 (1896) 48

I. C. C. v. Oregon-Wash. R. & Nav. Co., 288 U. S. 14, 41; 77 L. ed. 588, 604 (1933) 7

I. C. C. v. Stickney, 215 U. S. 98, 105; 54 L. ed. 112, 114 (1909) 29

Industrial Railways Cases, 37 I. C. C. 408 53

Iron and Steel Articles, 155 I. C. C. 517, 562; 161 I. C. C. 386; 161 I. C. C. 608 17

PAGE

Koppers Gas & Coke Co. v. United States, 11 F. Supp. 467 ..... 57, 59

Los Angeles Switching Case, 234 U. S. 294; 58 L. ed. 1319 (1914) 11, 15

Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 247; 57 L. ed. 1472 (1913) 24, 38

Nashville C. & St. L. Ry. v. State of Tennessee, 262 U. S. 318; 67 L. ed. 999 (1923) 47

National Malleable Castings Company v. P. & L. E. R. R. Co., 51 I. C. C. 537, 541 18

National Tube Company et al. v. Baltimore & Ohio Railroad Company et al. (1919) 59

New York Central, etc. Railroad v. General Electric Co., 219 N. Y. 227, 114 N. E. 115 (1916) 30, 31, 32, 33

Peavey & Co. v. Union Pacific Ry. Company, 176 Fed. 409, 422 (1910) 43

Pennsylvania Sand & Gravel Producers Asso. v. Baltimore & Ohio Railroad Co., 104 I. C. C. 717 (1925) 18

"Pick Up and Delivery in Official Territory" (Decided Oct. 13, 1936, 218 I. C. C. 441) 20

Pittsburgh Plate Glass Co. v. Director General, 58 I. C. C. 81 18

Poor, A. J., Grain Co. v. C., B. & Q. Ry. Company, 12 I. C. C. 418, 422 (1907) 42

Riter-Conley Manufacturing Co. v. Director General, 58 I. C. C. 327 (1920) 39

Standard Oil Company v. Director General, 59 I. C. C. 620 (1920) 39

Sun Co. v. Director General, 68 I. C. C. 11 (1922) ... 39

PAGE

Tap Line Cases, The, 234 U. S. 1; 58 L. ed. 1185 (1914) 15

Texas & Pacific Railway Co. v. Abilene Cotton Oil Company, 204 U. S. 426; 51 L. ed. 553 (1907) ... 42

Texas & Pacific Railway Company v. I. C. C. 162 U. S. 197; 40 L. ed. 940 (1896) 48

Texas and Pacific R. Co. v. U. S. 289 U. S. 627, 648; 77 L. ed. 1410, 1427 (1933) 50

United States v. Baltimore & Ohio Railroad Co., 231 U. S. 274, 293; 58 L. ed. 218, 227 (1913) 28, 54

United States v. Baltimore & Ohio Railroad Company, 293 U. S. 454, 462; 79 L. ed. 587, 594, 595 (1935) 45

United States v. Chicago, M., St. P. & P. R. Company, 294 U. S. 499, 504; 79 L. ed. 1023, 1028 (1935) 46

United Chemical & Organic Products Company v. Director General, 60 I. C. C. 523 (1921); 73 I. C. C. 100 (1922); 112 I. C. C. 687 (1926) 39

United States v. Union Stock Yard & Transit Co., 226 U. S. 286, 57 L. ed. 226, 233 10

STATUTES.

Interstate Commerce Act, Sec. 1 (3) 9

Sec. 6 (1) 29, 40

Sec. 6 (7) 41

Sec. 15 (1) 44, 45

Sec. 15 (13) 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

NO. 734

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants

v.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY and PITTSBURGH PLATE GLASS COMPANY, ET AL.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR APPELLEES.

OPINION DELIVERED IN THE COURT BELOW.

The opinion delivered by the specially constituted statutory Court below will be found reported in American Sheet & Tin Plate Co. v. United States, and five other cases (consolidated for hearing), 15 Fed. Supp. 711.

COUNTER STATEMENT OF THE CASE.

We do not regard Appellants' statement of the facts of the case as accurate nor complete. The essential facts may best be stated in the words of the Findings of Fact of the Court below, as follows:

> "1. The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows. American Sheet & Tin Plate Company, Vandergrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Brackenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and the West Leechburg Steel Company at Leechburg, Pennsylvania. All of these plants are served by the Pennsylvania Railroad Company, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company, common carriers engaged in interstate commerce."
>
> "2. At each of plaintiffs' plants, terminal switching is performed in connection with the receipt and delivery of freight under the provisions of duly filed and published railroad tariffs, which provide that the industry will perform the terminal switching service for account of the railroad company and that the industry will be allowed for such service, out of the current freight rates, the actual

cost for service performed but not exceeding specified amounts per car."*

"3. By long continued custom and practice of both carriers and shippers such terminal switching service, namely, the placement of cars in position accessible to consignors and consignees respectively for loading and unloading, is part of the transportation service which the carriers are obliged to perform under the compensation afforded by the published freight rates."

"4. The carriers have not provided in their published tariffs any separately established charges for such terminal switching services to be exacted in addition to the published freight rates."

"5. That in each of the present cases the terminal switching service performed is covered by the railroads' published tariffs, and is a part of the line-haul freight charge, and where the plaintiffs have been engaged by the railroad companies to do this 'spotting service' themselves, they are entitled to the allowances provided for in the published freight tariffs."

"6. In the present cases, none of the industries has refused to permit the railroad to enter upon the industrial tracks; the physical condition and layout of the industrial tracks will accommodate the locomotive power of the carriers without hazard or excessive delay; and the industries receiving the allowances do not occupy large areas with many scattered plants, connected with an intricate sys-

* While an allowance to Weirton Steel Company has been published and in effect for some years, it has never been paid and the railroad itself has been doing the spotting work.

tem of industrial tracks and used chiefly as industrial facilities."

"7. In the present cases there was no substantial evidence to support a conclusion that the so-called interchange tracks at any of these industries are points where the cars would be either accessible or convenient for loading by the consignor or unloading by the consignee."

"8. There was no evidence of record before the Commission tending to show that the allowance in any of these cases was excessive."

"9. In none of the present cases was there any finding of the Commission that the allowance is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, nor was there any substantial evidence on which the Commission could have based such findings."

The Appellants assign error as to each of the above findings, and the broad issues covered by them are thus squarely presented in these appeals.

The detailed facts with relation to the several plants of Appellees here involved, and the spotting service performed by the carriers serving them, will be found at the following pages of the Record, respectively:

Name of Plant	*Pages of Record*
American Sheet & Tin Plate Co.	R. 231-243
Allegheny Steel Company	R. 199-204
Pittsburgh Plate Glass Co. (Ford City, Pa., plant and Crystal City, Mo., plant),	R. 214-231
Weirton Steel Company,	R. 209-214
West Leechburg Steel Company,	R. 204-208

It must be borne in mind that the only service intended by the term "spotting", as used in these cases, is a single movement from the point of interchange to a definite point for loading and unloading each car. The Appellants' brief implies, although it does not so state, that we are concerned with interior movements of plant traffic to and from various parts of the establishment. The Appellees have at no time claimed that such movements would be the duty of the carrier, nor do the allowances cover them. The only interruption shown in the single movement which is called "spotting" is for weighing the car and its contents for billing purposes to the mutual benefit of both carrier and shipper.

SUMMARY OF ARGUMENT.

Railroads are the private property of their owners and are free to manage their business affairs provided they do not give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced. The Commission's functions are limited in scope by the Acts of Congress.

The placement of cars at reasonably convenient and accessible places for loading and unloading within industrial plants, including those of Appellees, is a common carrier service to which shippers are entitled and which the carriers are in duty bound to perform. This spotting service is a transportation service under the Interstate Commerce Act. The existing rate structure has been erected on the assumption that the carrier is obligated to perform such service. The established custom and practice is evident from the prior views of the Commission and the undisputed testimony of the witnesses in the present cases. The carrier is obligated to furnish the transportation service included in

the rate, and if the spotting service was not included therein, the carrier's tariffs were required to so specify.

Certain extraordinary circumstances, not present in these cases, may relieve or limit the obligation of the carriers to perform the spotting service.

The carriers may at their election either perform the spotting service themselves or they could lawfully employ Appellees to perform the spotting service on the carrier's behalf and pay reasonable compensation therefor.

An allowance to a shipper when provided in a published tariff of a carrier cannot be construed as a rebate or to violate Section 6 of the Interstate Commerce Act.

To support a cease and desist order by the Commission it must make the necessary quasi jurisdictional findings of fact that the rate or practice complained of was unreasonable, unjustly preferential and unduly discriminatory or otherwise unlawful or the order is void. No such findings were made in these cases.

The decision of the Court below should be affirmed.

ARGUMENT.

I.

The Relative Status of the Carriers and the Commission.

It is apparent that in the transportation of freight by railroad someone must provide facilities for the receipt and delivery of the property transported. There must be a place of loading and unloading, and the car must be transported to and from that place by someone. This placement or so-called "spotting service" is indispensable, and the decisive question here is—Do the carriers undertake to perform it at appellees' plants as a part of the transportation service included in the line-haul rates?

In spite of the vastness of the record that has raised this issue, it is in reality a simple one. In approaching its solution it is important that we should bear in mind the relative status of the carriers and the Interstate Commerce Commission.

The Commission is not possessed of general managerial powers over carriers, but its functions are limited in their scope to those particular circumstances in which Congress has vested it with supervisory jurisdiction. In the words of Mr. Justice Brewer: "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager." *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108, 118; 52 L. Ed. 705, 712 (1908). See also *Interstate Commerce Commission v. Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, 41; 77 L. Ed. 588, 604

(1933). "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission,* 162 U. S. 184, 197; 40 L. Ed. 935, 939 (1896).

The well settled practice of the Pennsylvania Railroad and other carriers in the area here involved of treating the terminal or spotting service as included in the transportation furnished under the published station to station rates was adopted and carried out in the exercise of this contractual freedom which all carriers enjoy, and such practice may not be abolished by a cease and desist order of the Commission, as was attempted in these cases, unless the requisite jurisdiction is found in the Interstate Commerce Act and unless any quasi-jurisdictional findings upon which the Commission's authority is founded are fulfilled.

II.

The Placement of Cars at Reasonably Convenient and Accessible Places for Loading or Unloading Within Industrial Plants, Including Those of Appellees, Is a Common Carrier Service to Which Shippers Are Entitled, and Which the Carriers Are in Duty Bound to Perform, and Is a Transportation Service Under the Interstate Commerce Act. Certain Extraordinary Circumstances, Not Present in These Cases, May Relieve or Limit This Obligation (Conclusion of Law No. 1 of the Court Below (R. 573)).

A. THE SPOTTING SERVICE IS A TRANSPORTATION SERVICE UNDER THE INTERSTATE COMMERCE ACT.

The spotting service falls clearly within the domain of railroad transportation as contemplated by Congress.

Section 1, paragraph (3), of the Interstate Commerce Act, defines "transportation" as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, *and all services in connection with the* receipt, *delivery,* elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling *of property transported.*" (Italics ours)

This Court has frequently recognized that the transportation service as thus defined in the Interstate Commerce Act includes delivery and embraces the performance of spotting service within an industrial plant:

Interstate Commerce Commission v. Atchison, T. & S. F. Ry. Co., 234 U. S. 294, 308-312; 58 L. Ed. 1319, 1327 (1914).

Chesapeake & Ohio Ry. Co. v. Westinghouse, Church, Kerr & Co., 270 U. S. 260, 265; 70 L. Ed. 576, 578 (1926).

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 198; 79 L. Ed. 1382, 1388 (1935) (Live Stock)

That the Act extends to all terminal facilities and instrumentalities, and that transportation does not cease at the interchange track is clearly pointed out by this Court in the case of *United States v. Union Stock Yard & Transit Company*, 226 U. S. 286, 57 L. Ed. 226, 233 (1912), where Mr. Justice Day said:

> "Together, these companies, as to freight which is being carried in interstate commerce, *engage in transportation* within the meaning of the act, *and perform services as a railroad* when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. * * * In *Union Stock Yards Co. v. United States*, 94 C. C. A. 626, 169 Fed. 404, Mr. Justice Van Devanter (while a circuit judge) speaking for the court of appeals, said (406):
>
> " 'Its (the Stock Yards Company's) operations * * * include the maintenance and use of railroad tracks and locomotives, the employment of a corps

of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. *The carriage of these shipments from the transfer track to the sheds or pens, and vice versa, is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route.* True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point.' " (Italics ours)

B. THE EXISTING RATE STRUCTURE HAS BEEN ERECTED ON THE ASSUMPTION THAT THE CARRIER IS OBLIGATED TO PERFORM THE SPOTTING SERVICE.

It is astonishing to find Appellants stating in their brief (page 31) that "it has never been, and is not now, general railroad custom and practice to treat the 'spotting' service here involved as included in the transportation obligation under the line-haul rate." This Court itself, in the *Los Angeles Switching Case,* 234 U. S. 294; 58 L. ed. 1319 (1914), calls attention to the findings of the Commission: "That a spur track delivery is a substitute service and not supplemental to any other delivery (page 308 U. S.; 1326 L. ed.); *that carriers throughout the country customarily 'so treat industry's spurs of the kind here in question'",* the only exception being, apparently, the cities of Los Angeles, San Francisco and San Diego. Furthermore, the Commission itself in *Car Spotting Charges,* 34 I. C. C. 609, states:

> "It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line-haul rate."

The original report of the Interstate Commerce Commission concludes that the spotting service is not included in the rate, that the carriers are in consequence not compensated for performing it, and therefore are not obligated to perform it and may not grant allowances in lieu of its performance. The congenital defect of the reports is that no such proposition is possible under the law and the uncontradicted testimony of carriers and shippers alike.

The Importance of Custom and Practice.

The difficulty with the premise on which the Commission proceeds is that it comes after more than forty years of railroad practice and custom to the contrary, according to the undisputed evidence relating to the area east of the Mississippi and north of the Potomac and Ohio.* Ordinarily custom and practice present a question of fact to be determined from the record alone, but when, as here, the custom and practice has been established for such a time as to be expressed and recognized in the decisions of courts and *quasi* judicial bodies, the question is removed from the realm of fact alone, and becomes, at least in part, a matter of law.

The importance of custom and practice in defining the extent of transportation service is indicated in

---

*The New England carriers have not adopted the practice of paying allowances for spotting, but quite generally perform the spotting services requested by their industries. (R. 250)

Adams v. Mills, 286 U. S. 397, 409; 76 L. ed. 1184, 1193 (1932). Mr. Justice Brandeis said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 294, 66 L. ed. 943, 947, 42 S. Ct. 477. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained."

Atchison, Topeka & Santa Fe Ry. Company v. United States, 295 U. S. 193, 200; 79 L. ed. 1382, 1389 (1935) is to the same effect. The opinion of Mr. Justice Butler states:

> "Long continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier. *Adams v. Mills, supra* (286 U. S. 410, 76 L. ed. 1184, 1193, 52 S. Ct. 589). So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties for this service from mere egress such as is included in transportation of live-stock to destinations other than public yards."

PRIOR VIEWS OF THE COMMISSION.

Prior decisions of the Commission are of particular importance here because of the fact that it has exercised supervision over the rate structure for fifty years. If it can be demonstrated that the Commission has consistently taken the position that the spotting service is included, it must follow that the rate structure has been erected on that basis. The prior views of the Commission cannot be the subject of serious dispute. They are established by decisions almost without number. It will suffice to refer to a few of them.

The most important decision of the Commission on the question is that rendered in *Car Spotting Charges*, 34 I. C. C. 609 (1915), quoted in full in the Appendix to this brief. It is difficult to single out for quotation parts of the decision, for the case covers every question raised in the report here under review, and is opposed to the present report in every particular. The facts which brought the case before the Commission are important. In that case the carriers east of the Mississippi River and north of the Ohio and Potomac Rivers had filed tariff schedules directly responsive to a suggestion which had come from the Commission itself in the *Industrial Railway Cases*, 29 I. C. C. 213 (1914.) These tariffs provided for the imposition of specific spotting charges at the several hundred named industries. In other words, the carriers in 1913 proposed a scheme of charges to apply at all industries having systems of plant tracks when there were interchange tracks on which the cars were first deposited by the carrier for subsequent movement to places of loading and unloading. The decision of the Commission was not hastily made. It was the result of a long investigation and careful consideration of all applicable principles and the recognition of the

compelling requirements of the decisions of this Court in *The Tap Line Cases,* 234 U. S. 1, 58 L. ed. 1185 (1914), and the *Los Angeles Switching Case,* 234 U. S. 294, 58 L. ed. 1319 (1914). There is no doubt under the express language of that decision of the Commission that the service is included in the American rate structure east of the Mississippi and north of the Ohio and Potomac, and that the mere size or complexity of the industry is not controlling. We quote from the decision, 34 I. C. C. 609, at page 616 (Appendix, p. 63):

> "It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line-haul rate, and in the *Los Angeles case,* 18 I. C. C. 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. *Los Angeles case,* 234 U. S. 294. *The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries.*

> "As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, *without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary.*" (Italics ours)

The *Car Spotting Charges Case* was not the first time the question had been before the Commission. In *Associated Jobbers of Los Angeles v. A. T. & S. F. Ry. Company,* 18 I. C. C. 310, 314 (1910), the Commission said:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery."

Commissioner Lane, in the course of the majority opinion, remarked further at page 316 of the decision:

> "The refinement of the English method of stating rates has not appealed to the mind of the American railroad man, for the same reason, perhaps, that American hotel keepers do not make a separate charge to their guests for lights or soap."

Since the *Car Spotting Charges Case,* the decisions of the Commission have consistently followed the doctrine there established.

Transportation rates on various commodities have been fixed by the Commission in numerous cases without the imposition of additional charges for spotting

services*, which, as a matter of practice, were being performed by or at the expense of the carriers. Outstanding among these cases for present purposes is *Iron and Steel Articles,* 155 I. C. C. 517, 562; 161 I. C. C. 386; 161 I. C. C. 608, where the Commission, following an exhaustive investigation, made a "thorough revision" of the rates on iron and steel articles (the business in which Appellees' plants are engaged) in eastern territory. Clearly, the line-haul rates prescribed in that decision were not intended for application only to and from the interchange tracks of the iron and steel plants. (See testimony of Bihler, R. 491.) There is not even a suggestion of such limited application in the Commission's Report. Likewise, in the case of *Coke Between Points in Central and Illinois Territories,* 194 I. C. C. 640 (1930), and *Coal, Bituminous, Ex River, etc.,* 197 I. C. C. 617 (1933), both of which commodities are consumed in very large quantities at the plants of Appellees, the Commission prescribed scale rates without mention of any spotting charge, and without restriction of the application of such rates to and from plant interchange tracks. See to the same effect:

Industrial Sand Cases, 1930, 188 I. C. C. 99 (1932).

Consolidated Stone Cases, 200 I. C. C. 65 (1934).

General Petroleum Investigation, 171 I. C. C. 286 (1931).

Eastern Class Rate Investigation, 164 I. C. C. 314 (1930).

---

* The only exception is the Iron Ore Rate Cases, 41 I. C. C. 181, wherein special reference was made to exemption of the terminal placement services from the established rate. See p. 219 of that decision. No similar expression or action is found in any other rate decision of the Commission.

Cement in Trunk Line Territory, 174 I. C. C. 224 (1929).

Pennsylvania Sand & Gravel Producers Asso. v. Baltimore & Ohio Railroad Co., 104 I. C. C. 717 (1925).

There are numerous additional decisions where the Commission in recognition of the carriers' obligation to perform spotting services under the line-haul rates, approved or directed allowances to large industries for so doing. Surprising as it may seem, the allowances at the plants of two of the Appellees are now being paid under alternative orders of the Commission. *Pittsburgh Plate Glass Co. v. Director General*, 58 I. C. C. 81; *Allegheny Steel Co. v. Director General*, 60 I. C. C. 575. In both instances, the appellees complained of discrimination and the Commission ordered the defendant carriers either to grant spotting allowances to them or cancel similar allowances paid to other plants, their competitors. The Commission now finds these very allowances which it prescribed, to be unlawful.

In *National Malleable Castings Company v. P. & L. E. R. R. Company*, 51 I. C. C. 537, 541, no less than *twenty-four* previous cases are cited by the Commission, wherein it had:

> "• • • fixed reasonable allowances for switching to and from the tracks of the line-haul carriers performed by the industry itself either directly or through a common-carrier industrial line and in many instances the character of the switching was similar to that performed by the present complainant."

The report states, page 538:

> "The services performed by complainant consisted of switching cars from defendants' interchange tracks, *weighing, classifying, and spotting once for loading or unloading* at convenient places within the plant property, and reversing the movement with outbound cars."
>
> * * * * * * *
>
> "It has been the practice of the carriers at Sharon and in the surrounding iron and steel industrial region, to perform the services of spotting cars at convenient places within the inclosures of practically all of the iron and steel manufacturing plants which do not operate private engines, without charge therefor in addition to the line-haul rates, and to absorb out of the line-haul rates the charges of separately incorporated industrial railroads for interchange switching. *Car Spotting Charges, supra.* At most of the Sharon plants the carriers have performed services substantially similar to those performed by complainant at its plant."

See also *Allowance for Terminal Switching at Dekalb, Illinois*, 165 I. C. C. 27.

In reliance on this chain of decisions of the Commission, industries were built and developed. Until the institution of the present proceeding there was no thought on the part of either carriers or shippers that the doctrine which the Commission had repudiated and referred to as "revolutionary" in 1915 could have any place in our rate structure.

Then came the astounding decision of the Commission in the cases at bar, followed, it now appears, by another change of heart, as is evidenced by the views of the Commission in "Pick Up and Delivery in Official Territory" (Decided October 13, 1936, 218 I. C. C. 441) where the Commission, in apparent disregard of the principle it attempted to lay down in the cases at bar—that the service under the line-haul rates ended at the point of interchange—approved the practice whereby the carriers under their regular line-haul rates now pick up and deliver less carload freight at the customer's door, which is not even connected with the rails of the carrier, or grant allowances to shippers for performing this pick up and delivery service.

Testimony of the Witnesses.

The affirmative and unqualified testimony in this proceeding of numerous witnesses establishes that for many years it has been the universal custom and practice of the railroads of the United States east of the Mississippi and north of the Ohio and Potomac (including those involved in these appeals) to include all spotting services in their established freight rates. As illustrative of such testimony see the following:

J. L. Eysmans, Vice President, Pennsylvania Railroad Company. (R. 453-4)

J. R. Downes, Chief of Freight Transportation, *ibid.* (R. 339, 497)

D. F. Stevens, General Superintendent of Transportation, Baltimore & Ohio Railroad Company. (R. 500)

Samuel House, Freight Traffic Manager, *ibid.* (R. 335)

Ira H. Hubbell, Assistant Traffic Manager, New York Central Lines. (R. 293, 295)

E. B. Moffatt, General Superintendent, Delaware, Lackawanna & Western Railroad Company. (R. 261)

Jasper N. Haines, General Manager, Lehigh Valley Railroad Company. (R. 281, 285)

M. V. Bechstedt, General Freight Agent, Delaware & Hudson Corporation. (R. 254)

J. L. O'Toole, Assistant to General Manager, Pittsburgh and Lake Erie Railroad Company. (R. 330)

F. T. Sladden, General Freight Agent, *ibid.* (R. 319)

Henry W. Beyers, Vice President, Chicago & Northwestern Railway Company. (R. 347)

C. E. Johnston, President, Kansas City Southern Railway Company. (R. 426)

W. N. Deramus, General Manager, *ibid.* (R. 416)

T. H. Meeks, Assistant General Manager, Texas and New Orleans Railroad Company. (R. 402)

F. A. Key, Jr., Traffic Manager, Louisiana & Arkansas Railway. (R. 399)

Robert N. Nash, Freight Traffic Manager, St. Louis-San Francisco Railway Company. (R. 394)

B. F. Parsons, General Freight Agent, Chicago Great Western Railway Company. • (Orig. Tr. 4553)

Louis C. Bihler, Traffic Manager, Carnegie Steel Company. (R. 489)

We direct the Court's attention to the testimony of two representative witnesses.

• "Orig. Tr." as used in this brief has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586)

Mr. Julien L. Eysmans, Vice President in charge of traffic of the Pennsylvania Railroad, and one of the senior traffic officials of the country, expressed in the course of his examination his complete concurrence in the statement of the Commission in the *Car Spotting Charges Case, supra*:

> "As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary." (R. 454)

Mr. Eysmans' testimony on succeeding pages of the record is most illuminating and clearly indicates the error of the decision subsequently entered by the Commission in these proceedings.

Another witness, perhaps the dean of the traffic men employed by industries, who testified in these proceedings, was Louis C. Bihler, traffic manager of the Carnegie Steel Company. His testimony was given as the result of continuous transportation and traffic service first with the railroads and later with industries, dating back to May, 1883 (R. 489). He too expressed his emphatic agreement with the statements and conclusions of the Commission in the *Car Spotting Charges Case*, last above quoted. Mr. Bihler testified (R. 490).

> "The Commission having found that the freight rates included the service of placement for loading and unloading, the railroads continued their practice the same as they had been doing many years before, and in addition, where the industry provided

an instrumentality of transportation, and performed part of the terminal service or spotting for account of the carrier, the industry made arrangements with the carriers for compensation based on cost, figured by the railroads themselves, through a Committee of Accounting Officers, carefully analyzing the cost of the industry's engine service based upon the records of the year 1916. As I recall it, this plant facility allowance authorized under Section 15 of the Interstate Commerce Act became effective about the year 1917. Tariffs were published by the carriers and filed with the Commission covering these allowances. In most cases, the tariff specified the allowance to be the actual cost, but not beyond a certain maximum.

"Since 1915 both the railroads and shippers treated the rates then published and those published thereafter as including the performance by the carrier of this service of placing cars for loading and unloading at convenient points in plant of the industry.

"It has been customary for our traffic department to furnish freight rates to our purchasing officers and to our sales department, and invariably and in all cases, such rates have been quoted to our other officers without any strings tied thereto; in other words, these officers always understood clearly that the freight rates always included the service of placement for loading or unloading according to whether the material was outbound or inbound. If freight rates were limited to line-haul service and other charges were to be added, we certainly would have raised a question as to the reasonableness of such application. To our minds and to the minds of all shippers, the question always was 'Is this rate a reasonable one, not only to cover the line-haul

but to cover the terminal service of the carrier at points of loading and unloading as well?' It is, of course, understood that our rates are made on a group basis, and these group rates have always included spotting service."

In addition to no less than 562 particular individual industries which were covered by comprehensive testimony in the investigation and which are served by so-called systems of side tracks, several thousand other industries are referred to in the Record as served by systems of side tracks on all of which the carriers spot the cars. The testimony before the Commission can leave no possible doubt as to the uniform custom under which the carriers have performed the spotting service under the compensation afforded by the regular freight rates, or have borne the cost thereof through the medium of allowances, or have stood ready and willing to perform such service where the industry for its own reasons preferred to spot the cars at its own expense.

C. THE CARRIER IS OBLIGATED TO FURNISH THE TRANSPORTATION SERVICE INCLUDED IN THE RATE.

On several occasions this Court has called attention to the obligation of the carrier to perform a transportation service included in the rate, the sole question being whether or not the service is so included.

The case of *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S. 247; 57 L. ed. 1472 (1913), should be very persuasive on the question now under consideration. That case holds specifically that where the tariffs do not specify the precise point at which goods will be received for transportation for the tariff rate, that point will be made certain by the practice followed by the carrier; and

that the carrier might lawfully make an allowance to shipper for transporting the goods from such point made definite and certain by the custom and practice of the carrier to the point where carrier chose to actually receive the goods.

The Mitchell Coal Company brought suit against the Pennsylvania Railroad for damages alleged to have been occasioned by the payment by the railroad of rebates to the Altoona and several other Coal Companies. It was alleged that the Mitchell Company was in competition with the other companies in shipping coal and coke over the Pennsylvania Railroad from the Clearfield district to the same general markets; and that the carrier paid to the other Coal Companies rebates, pretending that the money was given them as allowances for transportation service rendered by them in hauling cars over spur tracks between their mines and the railroad station. (230 U. S. 249; 57 L. ed. 1473).

In the Clearfield district there were many mines, some near the railroad and others at considerable distances therefrom but reached by lateral lines or spur tracks over which cars were carried to and from the mines. This Clearfield district was treated as a single shipping station and the rates from all points therein were the same where coal was transported to the same point beyond the state. The published tariff named the rate from station to destination but it was uniformly understood to include the haul from the mines. (230 U. S. 251, 252; 57 L. ed. 1474).

The other Coal Companies hauled coal from their mines to the station. The railroad paid them an allowance for that service but refused to make the same arrangement with the Mitchell Company. (230 U. S. 252; 57 L. ed. 1474).

The court said (p. 263 U. S.; 1479 L. ed):

"To pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot. The plaintiff insists that such is the case here, and that, as the tariff named the rate from the station, it could not lawfully include the haul from the mine, and consequently paying the shippers for doing their own hauling was a mere rebate.

"Such undoubtedly it would have been if naming the rate from station to destination meant that the haul had to begin at the depot building. But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield district was treated as a single shipping point, and where the rate, though named and published as from the station, was universally applied from the mines of the Mitchell Company as well as the other companies named in the declaration and all others located in the Clearfield district.

"Inasmuch as this rate included the haul the Railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the coal com-

panies to render that service, paying them proper compensation therefor."

Another case in point is *Chesapeake & Ohio Ry. Company v. Westinghouse, Church, Kerr & Company,* 270 U. S. 260, 70 L. ed. 576 (1926), where it was held that a carrier cannot, in view of the provisions of the Interstate Commerce Act, recover extra compensation for spotting service covered by the line-haul tariff, even though the consignee had contracted to pay such extra charge. Mr. Justice Brandeis, speaking for the court (p. 265 U. S.; 577 L. ed.) said:

> *"The service of spotting cars was included in the linehaul charge under both interstate and state tariffs.* The railway contends that under the tariffs no obligation rested upon the carrier either to furnish spotting service solely for the convenience of a shipper or to furnish him special facilities to meet abnormal and unprecedented conditions; that the contract was, therefore, not without consideration; and that, being for rental of equipment, it was not for a common carrier service and, hence, a contract therefore was legal under the Interstate Commerce Act, although no tariff provided for the charges. The service by special engine and crew contracted for and given was not spotting solely for the convenience of the shipper. *It was the spotting service covered by the tariff.* Compare Re Car Spotting Charges, 34 Inters. Co. Rep. 609; Downey Shipbuilding Corp. v. Staten Island Rapid Transit R. Co., 60 Inters. Com. Rep. 543. *It is true that abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking com-*

pensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act, Act of February 4, 1887. Chap. 104, sec. 6 (7), 24 Stat. at L. 379, 381, Comp. Stat. sec. 8569, 4 Fed. Stat. Anno. 2d ed. p. 406, as amended. A contract to pay this additional amount is both without consideration and illegal." (Italics ours).

In *United States v. Baltimore & Ohio Railroad Company*, 231 U. S. 274, 293, 58 L. Ed. 218, 227 (1913), this Court expressed the opinion that—

"• • • if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street Station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. Wight v. United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. Rep. 822; General Electric Co. v. New York C. & H. R. R. Co., 14 Inters. Com. Rep. 237; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. Ed. 83, 87, 32 Sup. Ct. Rep. 22."

D. IF THE SPOTTING SERVICE WERE NOT INCLUDED IN THE PUBLISHED FREIGHT RATES, THE CARRIERS' TARIFFS WERE REQUIRED TO SO SPECIFY.

The carriers in these cases duly filed and published tariffs specifying station to station rates and under such tariffs the carriers either performed the spotting service at Appellee's plants or duly filed local freight tariffs covering terminal allowances to the industries for performing such services.

Section 6(1) of the Interstate Commerce Act requires carriers to file with the Commission and print and keep open to inspection schedules showing, among other things, "separately all terminal charges • • • and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates." If the terminal service in these cases was not included in the published rates, the carriers were required to specifically exclude it in their tariffs. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105, 54 L. Ed. 112, 114 (1909) where this Court said:

> "The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it."

There is no evidence in the Record of any provision in the tariffs of the carriers involved for a separate terminal charge covering the spotting services at Appellee's plants or at any other industry.

E. THE EXTRAORDINARY CIRCUMSTANCES WHICH WILL RELIEVE THE CARRIERS OF THIS DUTY ARE NOT HERE PRESENT.

It is well recognized that the formula for which we contend is not inflexible. Certain extraordinary circumstances may relieve or limit the ordinary obligation of the carrier to perform the spotting service, but no such circumstances are present in these cases.

Most of the circumstances which give rise to such limitations have their origin in the rule of contract law that if a person (the carrier) contracts to do a specific thing (spotting) and the other party (the industry) throws obstacles in the way and makes it unreasonably difficult for the promissor (the carrier) to perform, the law excuses the promissor (the carrier) from performing his obligation. Typical of such circumstances are: (a) where the industry refuses to permit the carrier's locomotives to enter in and upon the private industrial tracks for the purpose of performing the spotting service; or (b) where the physical condition of the private industrial tracks—due to lack of adequate maintenance, excessive curvatures, light weight of rail or other obstacles—will not reasonably accommodate the carrier's power without hazard or excessive delay.

Appellants lay great emphasis upon the decision of the Commission in *General Electric Company v. N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237 (1908), and that of the New York Court of Appeals in *New York Central, etc. Railroad v. General Electric Company*, 219 N. Y. 227, 114 N. E. 115 (1916), involving the same factual situation. These decisions were made with reference to exceptional circumstances, and are readily distinguishable

from the cases in hand. *There the General Electric Company was unwilling to permit the Railroad Company to perform the spotting service,* and we wholeheartedly agree that under such circumstances an industry is not entitled to an allowance from a carrier. The duty to perform the service is upon the carrier, and the carrier, in the exercise of its discretion, may elect to employ the industry as its agent to perform the spotting service, always reserving the right, of course, to cancel its tariffs covering the allowance and to perform the service itself. This was the point on which the Commission's decision in the *General Electric Case* actually turned, as appears from its statement in *Car Spotting Charges,* 34 I. C. C. 609 (1915), where in distinguishing the *General Electric Case,* the Commission said:

> "In *General Electric Co. v. N. Y. C. & H. R. R. Co.,* 14 I. C. C. 237, we stated that common carriers could not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, but the case did not require a decision of that question. The point actually decided was that the complainant was not entitled to an allowance from the carrier for a service which the carrier was ready and willing to perform, and which the complainant performed because it was not convenient for it to permit the carrier to perform the service."

To the extent that the general language of the Commission in the *General Electric Case* casts a doubt upon the obligation of the carriers, under their published rates, to perform spotting service at ordinary large industrial plants, such doubt is effectively dispelled by the

subsequent decision of the Commission in *Car Spotting Charges* wherein the whole matter was thoroughly investigated, and by an additional twenty years of settled practice of both shippers and carriers in the interpretation of rates in accordance with the decision in the *Car Spotting Charges Case.*

The *General Electric Case* was exceptional in other particulars, which are pointed out by Mr. Justice Cardozo, speaking for the Court of Appeals of New York, in *New York Cent. & H. R. R. Co. v. General Electric Co., supra.* There the General Electric Company plant covered 180 acres, contained 140 buildings, which were connected by an extremely intricate system of interlacing tracks, used chiefly or exclusively as industrial facilities and over which the plant locomotives operated in the daily intramural movements essential in distributing materials and product to particular buildings for use in industrial processes. The Court regarded the elaborate system of operations which were essential to spot cars within such a plant as exceeding those standards for terminal services which custom had established. Justice Cardozo said:

> "We come back then to the test, which, vague as it is, remains the only safe one and we ask ourselves whether in the light of all the circumstances such a form of delivery is customary or reasonable."

And he concluded:

> "The defendant's (General Electric Company) standard of delivery does not conform, therefore, to the standard of custom."

On the contrary, in the present cases, the overwhelming and undisputed testimony establishes the custom

of the carriers to spot cars at plants such as those here involved. That custom has become even more firmly embedded in the rate structure since it was fortified by the decision of the Commission in the Car Spotting Charges Case.

The spotting service here involved is comparable, not to that of the *General Electric Case,* but to that done on public team tracks and private sidings. *According to the uncontradicted testimony of numerous witnesses, the cost per car incident to the spotting of cars on industrial plant tracks of the character here involved is less than the average cost of placing such cars on team tracks and private sidings.* See testimony of the following witnesses:

William J. Jones, Carnegie Steel Company. (R. 480)

V. W. Delaney, Youngstown Sheet & Tube Company. (R. 477)

J. L. Eysmans, Vice President, Pennsylvania Railroad Company. (R. 464)

J. F. Downes, Superintendent of Freight Transportation, *ibid.* (Orig. Tr. 2096, 11217)

H. R. Adams, Assistant General Manager, Erie Railroad Company. (R. 271)

Jasper N. Haines, General Manager, Lehigh Valley Railroad Company. (R. 283)

David B. Fleming, Assistant General Manager, New York Central Lines. (R. 301)

H. M. Eicholtz, Assistant General Manager, Chicago & Northwestern Railway. (R. 371)

J. F. Lord, Assistant to General Manager, Chicago and Eastern Illinois Railway. (R. 354)

D. S. Farley, Assistant to General Manager, Atchison, Topeka & Santa Fe Railway Company. (R. 356)

W. J. O'Brien, General Manager, Chicago River and Indiana Railroad. (R. 437)

L. R. Custer, General Manager, Bethlehem Steel Company. *(Orig. Tr. 9838)

W. J. Hammond, Traffic Manager, Inland Steel Company. *(Orig. Tr. 7638-9)

Hence we are here dealing with spotting as a mere substituted service, taking the place of ordinary team track delivery, and costing the carriers no more than the service in lieu of which it is given. Under these circumstances an additional charge cannot be made by the carrier. See *Interstate Commerce Commission v. Atchison, Topeka and S. F. R. Co.*, 234 U. S. 294, 58 L. ed. 1319, 1329 (1913).

Like the *General Electric Case*, each of the other decisions of the Commission upon which the defendants rely has relation to a special set of facts. There are only two cases where the question of spotting was examined as a whole in its broad aspects,—the Car Spotting Charges Case and this case.

F. THE FINDINGS AND CONCLUSIONS OF THE COURT BELOW SHOULD BE SUSTAINED.

The statutory court in setting aside the orders of the Commission in these cases, entered findings of fact 3, 4, 5 and 6 quoted on page three of this Brief, and the Court below similarly (R. 573) entered the following conclusion of law:

"1. The placement of cars at reasonably convenient and accessible places for loading or unload-

---

*"Orig. Tr." as used in this brief has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586)

ing within industrial plants, including those of plaintiffs, is a common carrier service to which shippers are entitled, and which the carriers are in duty bound to perform, and is a transportation service under the Interstate Commerce Act, particularly under paragraph (3), section 1, thereof. Certain extraordinary circumstances, not present in these cases, may relieve or limit this obligation."

In the light of the record and of the prior decisions of this Court, as well as those of the Commission itself, no other conclusion could reasonably have been reached.

III.

The Carriers Could Lawfully Employ Appellees to Perform the Spotting Service on the Carriers' Behalf and Pay Reasonable Compensation Therefor.

The Interstate Commerce Act expressly recognizes the propriety and indeed desirability of the employment of shippers by carriers to furnish facilities and perform services of transportation, where this is economical and in the interest of efficiency. This provision, found in paragraph (13) of section 15 of the Act, was incorporated on the recommendation of the Commission contained in its Annual Report to the Congress for the Year 1905, from which we quote the following:

> "*Terminal Roads, Elevator Charges and Private Cars.*
>
> "It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at

this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Morever, *there are many instances in which the service can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shipper himself.*

"We do think, however, that *the Commission should be empowered* in a case of this kind *to determine whether the allowance to the property owner is a just and reasonable compensation* for the service rendered *and to fix a limit* which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available." (Italics ours).

The language of paragraph (13) of section 15, enacted pursuant to the foregoing suggestion of the Commission, is as follows:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force

and effect and be enforced in like manner as the orders above provided for under this section."

The foregoing statutory provision for allowances to shippers by carriers has been frequently approved by this Court.

In *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83 (1911), it was held that contracts made by various railroads for elevation expenses of grain at points of trans-shipment at rates not exceeding those fixed by the Commission as reasonable, did not amount to illegal discriminations or rebates when paid to owners of elevators on their own grain, although such owners performed services other than those paid for at the same time, to their own advantage. It was further held that the Act of 1906 contemplates payment of reasonable compensation by carriers for services rendered or facilities furnished by owners of property transported, *the only power of the Commission being to determine the maximum of such compensation.*

After quoting that part of section 15 above set forth, Mr. Justice Holmes, speaking for the Court, said (p. 45 U. S.; 87 L. ed.):

> "Thus Congress clearly recognized that services such as those rendered by Peavey & Company, were services in transportation, and were to be paid for notwithstanding the possibility that some advantage might be gained as a result."

Later in the opinion he pointed out (p. 46 U. S.; 87 L. ed.):

> "The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the act of Congress in terms contemplates that if the car-

rier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, chap. 309, sec. 12, 36 Stat. at L. 539, 553.)"

In *Mitchell Coal & Coke Company v. Pennsylvania Railroad Company,* 230 U. S. 247, 57 L. ed. 1472 (1913), this court held that by custom and practice the coal rates apply not merely from the established stations of the carrier, but uniformly included the hauls over spurs from the mines. The court said (page 263 U. S.; 1479 L. ed.):

> "Inasmuch as this rate included the haul, the railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose, or it could employ the coal companies to render that service, paying them proper compensation therefor."

Although the record before the Commission in these cases shows that the carriers not infrequently had refused to employ a certain industry to perform spotting services and to grant an allowance under Section 15 of the Act, there is no instance covered by the investigation where any of the carriers serving the plants of appellees, nor, in fact, where any of the carriers in Trunk Line and Official Classification territory were refusing to perform the spotting service themselves without additional charge, where it was reasonably possible to do so. Instances are referred to in the record where the carriers

had in former years refused to publish an allowance to an industry for performing spotting services, but had subsequently done so (or performed the spotting service), under the terms of formal decisions of the Commission, requiring either payment or performance by the carrier.

Sun Co. v. Director General, 68 I. C. C. 11 (1922) (see Orig. Tr.* 11257);

Florence Pipe Foundry & Machine Co. v. Pennsylvania R. R. Co., 188 I. C. C. 215 (1932) (see R. 457);

Riter-Conley Manufacturing Co. v. Director General, 58 I. C. C. 327 (1920) (see Orig. Tr.* 9788);

Standard Oil Company v. Director General, 59 I. C. C. 620 (1920) (see Orig. Tr.* 7332);

United Chemical & Organic Products Company v. Director General, 60 I. C. C. 523 (1921); 73 I. C. C. 100 (1922); 112 I. C. C. 687 (1926) (see Orig. Tr.* 7325).

---

* "Orig. Tr." as used in this brief has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586)

IV.

An Allowance to a Shipper When Provided in a Published Tariff of the Carrier Cannot Be Considered as a Rebate or to Violate Section 6 of the Interstate Commerce Act.

The specific ground on which the Commission condemns the allowances here in question is clearly erroneous. It has been demonstrated beyond dispute that the service is included in the established rates. Despite this fact the Commission finds in the Supplemental Reports (R. 51):

> "That by the payment of an allowance the respondent carriers * * * refund or remit a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of Section 6 (7) of the act."

We have quoted the provisions of Section 15 (13) of the Interstate Commerce Act providing for allowances to be paid to shippers for performing services or furnishing facilities of transportation. It is indisputable that such allowances, which are payable out of the freight charges and affect the total which the shipper pays and the carrier receives on movements of freight, must be plainly provided for in tariff schedules filed with the Commission. This is in accordance with Section 6 of the Act, which provides:

> "Sec. 6 (1). That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points

on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force; and shall also *state separately all terminal charges*, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered* to the passenger, shipper, or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act." (Italics ours)

Paragraph (7) of Section 6, which is particularly referred to in the Commission's findings, reads as follows:

"(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed

and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified,* nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, *except such as are specified in such tariffs.*" (Italics ours).

In every one of these cases (as appears from the Bills of Complaint, answers filed and admissions read into the record (R. 516)), tariffs covering the allowances now condemned were regularly published by the carriers and filed with the Commission. Hence the payment of the allowances was *not in violation of paragraph (7) of Section 6, but in accordance therewith.* A violation would have resulted had the Railroads *failed* to pay the allowances as provided in their published tariffs.

The Commission and the Courts have uniformly held that the published tariffs of the Railroads are absolutely controlling in the matter of rates applied and charges exacted of shippers for all transportation services: *A. J. Poor Grain Co. v. C., B. & Q. Ry. Company,* 12 I. C. C. 418, 422 (1907); *Texas & Pacific Railway Co. v. Abilene Cotton Oil Company,* 204 U. S. 426, 51 L. ed. 553 (1907); *Davis v. Portland Seed Company,* 264 U. S. 403, 425, 68 L. ed. 762, 769 (1924); *Beaumont, Sour Lake & Western Ry. Co. v. Magnolia Provision Company,* 26 Fed. (2d) 72 (1928). In the case last cited the Fifth Circuit Court of Appeals said (p. 73):

"• • • The Supreme Court has held that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper. *Penn R. R. Co. v. International Coal Co.,* 230 U. S. 184, 33 S. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915 A, 315."

It inevitably results that for a carrier to comply with its published tariff which "is to be treated as though it were a statute" cannot possibly be held to subject the carrier to the granting of a rebate in violation of Section 6 (7) of the Act, and such has been the uniform view of the Courts:

> *Peavey & Co. v. Union Pacific Ry. Company,* 176 Fed. 409, 422 (1910):
>
> "Again, the allowance here in question was not a rebate because it was not a concession from the published schedules, but an allowance in accordance with them."

See also

> *American Sugar Refining Co. v. Delaware, L. & W. R. Company,* 207 Fed. 733, 744 (1913).

No carrier seeks to avoid the payment of these allowances. No shipper complains of them. Only the Interstate Commerce Commission, acting of its own motion, assails them, and we have demonstrated how completely without foundation are its conclusions from the standpoint of law as well as fact. Conclusion of Law No. 3 of the court below (R. 573) correctly states:

> "3. Such an allowance to a shipper, when provided in a published tariff of the carrier, cannot be considered as a rebate or in violation of Section 6 of the Interstate Commerce Act."

V.

To Support a Cease and Desist Order by the Commission It Must Make the Necessary Quasi Jurisdictional Findings of Fact, That the Rate or Practice Complained of Was Unreasonable, Unjustly Preferential, Unduly Discriminatory or Otherwise Unlawful, or the Order Is Void. No Such Findings Were Made in These Cases.

Section 15 (1) of the *Interstate Commerce Act* provides:

> "(1) That *whenever, after full hearing, upon a complaint* made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, *the Commission shall be of opinion* that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be *unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial*, or otherwise in violation of any of the provisions of this Act, *the Commission is authorized* and empowered to *determine and prescribe* what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to

be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, *and to make an order* that the carrier or carriers shall *cease and desist from such violation* to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (Italics ours).

As a condition precedent to a cease and desist order Section 15 (1) of the Interstate Commerce Act, quoted above, requires that the Commission must conclude that the practice "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act." This Court has not only insisted that such findings shall be made by the Commission but that they shall be clear and specific. The rule was thus announced in *United States v. Baltimore & Ohio Railroad Company,* 293 U. S. 454, 462; 79 L. ed. 587, 594, 595 (1935):

"The railroads contend that to support the order certain basic findings are essential; that these were not made; and that, hence, the order is void. This contention is in our opinion sound.

* * * * * * *

"In the *Florida Case* (*Florida v. United States,* 282 U. S. 194, 215, 75 L. ed. 291, 304) the legal dis-

tinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in *Beaumont, S. L. & W. R. Co. v. United States,* 282 U. S. 74, 86, 75 L. ed. 221, 229, 51 S. Ct. 1, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court, compare *Virginian R. Co. v. United States,* 272 U. S. 658, 675, 71 L. ed. 463, 472, 47 S. Ct. 222, is not fatal to the validity of the order. It is true that formal and precise findings are not required, under § 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' Compare *Manufacturers R. Co. v. United States,* 246 U. S. 457, 487, 62 L. ed. 831, 846, 38 S. Ct. 383. *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, 428, 59 L. ed. 644, 656, 35 S. Ct. 328, Ann. Cas. 1916B, 691, P. U. R. 1915D, 1072. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But § 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity."

So also in *United States v. Chicago, M., St. P. & P. R. Company,* 294 U. S. 499, 504; 79 L. ed. 1023, 1028 (1935), this Court said:

"This court has held that an order of the Interstate Commerce Commission is void unless sup-

ported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States,* 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119; *United States v. Baltimore & O. R. Co.,* January 7, 1935, 293 U. S. 454, ante, 587, 55 S. Ct. 268. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida v. United States,* 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119, supra. Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning."

See also

Atchison, Topeka & Santa Fe Railway Company v. United States of America, 295 U. S. 193, 79 L. ed. 1382 (1935).

Not all preferences are unlawful, but only such as create undue or unreasonable preference or prejudice. Nashville C. & St. L. Ry. v. State of Tennessee, 262 U. S. 318, 67 L. Ed. 999 (1923). The case of *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company,* 43 Fed. 37 (1890), is in point. The question before the court was whether the issue by a railroad company of party rate tickets, good for ten or more persons at 2¢ per mile, while charging for tickets for single persons at the rate of 3¢ per mile, was an undue or unreasonable preference or discrimination. The court held that it was not, and that the issue of the tickets was lawful. The decision contains a very broad and thorough discussion of what constitutes undue or unlawful preferences. This case was affirmed by this Court in *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company,* 145 U. S. 263, 36 L. Ed. 699 (1892). Again the court

gave a very thorough discussion of what discriminations are so undue or unreasonable as to come within the terms of the law. Both decisions emphasize how great is the number of cases involving some discrimination, but which are not *undue* or *unreasonable*. See also *Texas & Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940 (1896).

The question as to what constitutes undue and unreasonable preferences and advantages, etc., arises under such a variety of circumstances and is so complex that it cannot be answered by any set of rules. *Interstate Commerce Commission v. Louisville & N. R. Company*, 73 Fed. 409, 419 (1896).

All that the Commission finds in the cases at bar is "that by the payment of an allowance the respondent carriers provide the means by which the industry enjoys *a preferential* service not accorded to shippers generally." What does this mean? The uncontradicted testimony of a vast number of witnesses was to the effect that the American rate structure includes the placement of the car at a convenient place for loading or unloading,* that in the case of industrial plants the cost of such service is less than the cost of similar service at ordinary team tracks, and that the allowances here in question are less than it would cost the Railroads themselves to perform the terminal services.

We challenge the Government to point to any evidence in the 12,500 pages of original printed record of testimony or in the vast number of exhibits, which

---

* The uncontroverted testimony is further to the effect that it would be physically impossible to load or unload cars on the so-called interchange tracks, and hence these tracks could not be deemed convenient places for loading and unloading.

would sustain a finding by the Commission that the allowances here in question are "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial." The Commission could not and did not so find. It only concluded that the industry "enjoys a preferential rate not accorded to shippers generally." This is not a finding that such preferential or prejudicial treatment as exists is "undue" as required by Section 15 of the Act before a cease and desist order may be entered.

The Appellants in their brief (page 36) refer to Exhibit No. 150 of the Pennsylvania Railroad, and other similar exhibits showing instances where the spotting service is performed exclusively by the Railroad, or in part by the Railroad, and where the service is performed by the industry with and without the granting of an allowance. Appellants rely upon these exhibits as disclosing a series of unlawful discriminations as between those industries where the service is not performed nor an allowance granted and the remainder of the industries cited. The Commission, however, does not find that any such preference was undue or unlawful or unreasonable. The fact is that there was no evidence whatever of record to show that those industries which were not receiving the service or the allowance had requested either of them and in the absence of such a request there can be no unlawful discrimination. For reasons of their own, many industries prefer to do their own spotting service and refuse to permit the carriers to enter upon their property, as was the case with General Electric Company, to which we have referred. The exhibits in question demonstrate conclusively that the *general* custom and practice at industries throughout the territory of the Pennsylvania Railroad and other railroads involved in this class of exhibits was for the

carrier to perform the spotting service or to grant an allowance to the industry for so doing.

Undue or unreasonable preference or advantage involves a comparison between competitors, and the Reports make no such comparison and fail to disclose the respects in which the allowances are "preferential".

In *Texas and Pacific R. Co. v. U. S.*, 289 U. S. 627, 648; 77 L. ed. 1410, 1427 (1933), it is said:

> "The classical case of discrimination in rates is presented where a single carrier serving two points approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those to the point subject to the higher charge * * *. The reason for the doctrine is that preference or prejudice can be found only by a comparison of two rates. If these are the rate of one carrier to Point A and that of another to Point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination —must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under sec. 3 an alternative must be afforded. The offender or offenders may abate the discrimination by rais-

ing one rate, lowering the other, or altering both. Compare *American Express Co. v. South Dakota,* 244 U. S. 617, 624; *United States v. Penna. R. Co.,* 266 U. S. 191; *Chicago, T. & L. R. Co. v. United States,* 270 U. S. 287, 292; *Minneapolis & St. L. R. Co. v. Peoria & Pekin U. R. Co.,* 270 U. S 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative.

"The principle has been approved in decisions of this court with respect to practices, *Interstate Commerce Comm'n v. Diffenbaugh,* 222 U. S. 42; *Central Railroad of New Jersey v. United States,* 257 U. S. 247, and rates *East. Tenn. V. & Interstate Commerce Comm'n,* 181 U. S. 1; *Penn Refining Co. v. Western N. Y. & P. R. R. Co.,* 208 U. S. 208, 221."

In the case of *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company,* 43 Fed. 37 (1890), the court referring to the Interstate Commerce Act, said (p. 47):

"The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company or traffic, nor subject any particular person, company, or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or im-

pose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier."

To the same effect, see

East Tennessee V. & G. R. Co. v. Int. Com. Com., 181 U. S. 1; 45 L. ed. 719 (1901).
Cent. R. Co. of N. J. v. U. S., 257 U. S. 247; 66 L. ed. 217 (1921).

The Commission in these cases did not make any comparison between the rates or allowances given by the Pennsylvania Railroad and the other carriers serving the plants of appellees with the rates or allowances given by such carriers to any other shippers or consignees on their lines. There was no evidence in the record making such comparison. The tariffs of the carriers serving the plaintiff's plants assured to every industry located on their lines that cars shipped to such industry would be spotted for the single line-haul rate equally and without discrimination. There was no charge or evidence that these tariffs were not observed.

VI.

Reply to Brief for Appellants.

The brief of counsel for the United States and the Interstate Commerce Commission contains numerous statements which Appellees cannot accept as accurate and many unfounded contentions of fact and of law. It is unnecessary to burden the court with a detailed criticism of or rejoinder to Appellants' brief, but there are four features of Appellants' brief to which a brief reply seems appropriate:

FIRST: Woven through Appellants' entire discussion is the reiterated statement or implication that the spotting services, performed by the Pennsylvania Railroad at the Weirton plant or paid for by the railroads through the medium of the allowances at the other plants, are rendered "at the beck and call of the industries"; that the service performed is "standby service"; that the spotting service at these plants is done "when and as needed by the industry". This is pure assumption not supported by substantial testimony of record. It ignores the broad facts abundantly established by uncontroverted evidence and to which these particular industries afford no exception. The record shows that the allowances paid to Appellee industries cover only a fraction of the operating cost of the plant locomotives and crews who perform the work, that a large part of the engine time is devoted to services of the industry for which they are not compensated by the allowance, and that in each case the allowance was predicated upon careful application of a formula to a time and cost study made by the carriers at that industry. This formula, fully explained by numerous witnesses,* was adopted in conformity with the general conclusions of the Commission in the *Industrial Railways Cases*, notably 37 I. C. C. 408, and it expressly provides for the exclusion of all engine time devoted to plant service or beyond a point where substantial interference or interruption in performing the plant service may be encountered in determining the allowance. (R. 322; Rule 8, carriers' exhibit No. 106, vol. 2 of printed exhibits p. 300.)

---

* Witnesses Glynn, Pennsylvania Railroad (R. 470); Morris, for Central Freight Asso. carriers (R. 445); Lawrence, for Eastern Trunk Lines (R. 505); Boyd (R. 439) and Vivian (R. 363), for Western Trunk Lines; Sladden, for Pittsburgh & Lake Erie Railroad, and many others.

When an industry witness describes the spotting service performed by its locomotives and states that the work is done at times convenient to the industry, there is no proper implication that this is laying a burden on the carrier, for in the fixation of the allowance paid for the doing of the work, the cost figure used was predicated on termination of the work where substantial interruption or interference may be encountered and the performance of the work according to usual railroad practice. The formula so provides and there is no room for doubt on the point.

SECOND. The implication in the Commission's original report, 209 I. C. C. 11, that anything is unlawful which is of mutual benefit and advantage both to the carrier and to the shipper finds expression all through Appellants' brief. This Court has frequently pointed out that this assumption is erroneous, notably in *United States v. Baltimore & Ohio R. Co.*, 237 U. S. 274, 58 L. ed. 218, and *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83. The court below was correct in its conclusion of law No. 4 (R. 573):

> "4. A practice of a carrier may not be condemned because of the fact that it is beneficial to the shipper as well as the carrier."

The erroneous thought of Appellants is that when the Pennsylvania Railroad employs the Allegheny Steel Company to perform for the carrier the terminal switching service at that plant, if the arrangement is of any advantage whatever to the steel company, it is necessarily unlawful by reason of that fact. Admittedly it is unlawful if the advantage is undue. If, as the result of employing the industry to do the spotting, the industry is thereby convenienced and the railroad

saved expense, the two facts would seem both to commend the arrangement.

In *Car Spotting Charges,* the Commission condemned the proposed charge for spotting of cars by the railroads in large industries with complicated systems of trackage. Suppose in such an industry expressly covered by that decision the movements of railroad engines would conflict with the movements of plant engines but the latter stand aside to avoid such conflict. Suppose further that the railroad decides that it will grant an allowance to that industry and let the industry engines do the work. As the result of the new arrangement conflict between plant engines doing plantwork and the same engines doing railroad work becomes impossible. Interruption and interference automatically disappear. Surely the law does not forbid that result which is economically advantageous to all parties.

THIRD. Counsel for Appellants blow hot and cold in their brief as to the general custom and practice of the carriers in respect of spotting services. They carefully avoid any references to the abundant testimony of the railway operating and traffic witnesses who, without exception, testified that at all plants, large and small, within the section of the United States here involved the carriers assume the obligation of placing the cars at points reasonably convenient and accessible for loading and unloading. Their only references to the record are to exhibits and oral testimony going to a point which, when correctly stated, is not disputed. There are many industries who do their own spotting work and who receive no allowances. It is expressly conceded and at all times has been recognized that the railroads are free to decide whether they will employ an industry and

make it an allowance or whether they will themselves perform the service.*

Appellants stress the alleged conditions in New England and in the southern states, where we concede allowances are not prevalent, and avoid much discussion of the situation in the central states where there are many industries receiving allowances, a large number of which were granted by the Commission in formal decisions. As to those industries doing their work without an allowance there is no evidence that the carrier denies the duty of placing the cars and would not perform the service if asked to do so.†

FOURTH. The description of the circumstances and conditions supposed to exist at these five industries and incorporated on pages 73 to 117 of the government brief is not a fair and correct description in accordance with the record. We pass by the many partial and misleading statements. For example, in discussing Allegheny Steel Company it is said that the railroad witness testified (R. 203) that "the power that the Pennsylvania has in this vicinity could not do the spotting at this plant because it is too large to take the curves." The witness in the very next sentence of the narrative on that page of the record went on to say "this railroad does have power that can do it but not in this vicinity." The record

* Subject, of course, to the rule that there must be no unjust discrimination in granting one shipper an allowance and under like circumstances denying an allowance to his competitor. See the Commission's decision in *Florence Pipe case*, decided September 30, 1932, 188 I. C. C. 215, and to the testimony of Vice President Eysmans with regard to that industry, given prior to the Commission's decision. (R. 457)

† A good illustration is the American Steel & Wire Company plant at Worcester, Massachusetts, which performs the spotting service without an allowance. The witnesses for the carrier serving the plant stated they would perform the spotting service, as a matter of course, if called upon to do so. (R. 250)

bearing specifically on the five industries now before the court is not voluminous *and covers no more pages of the printed record than the number of pages devoted thereto in Appellants' brief.* There are just five printed pages of narrative of the testimony concerning Allegheny Steel Company (R. 119 to 204) and if the court will read these pages it can readily determine for itself whether the evidence proves that the Allegheny Steel Company is receiving an allowance covering performance of work which is not transportation within the accepted and statutory definition. The outstanding fact in that testimony, totally ignored by counsel for Appellants, is the uncontradicted statement of the witness for the Pennsylvania Railroad that the amount of this allowance of $1.07 per car was ascertained on the railroad formula, which formula clearly provides for the exclusion of all engine time beyond any point where interruptions or interferences are encountered and for the exclusion of time beyond the scales where cars are weighed for convenience. (R. 204).

There are two citations in the brief for Appellants as to which comments may be appropriate.

On page 66 of their brief, Appellants cite the decision in *Koppers Gas & Coke Co. v. United States,* 11 F. Supp. 467, where they say "the sufficiency of the Commission's findings, which were identical to those in the cases at bar, was challenged". They do not mention that this decision was on application for a *preliminary* injunction and that the case subsequently has been submitted but is not yet decided on final hearing. The court expressly stated (470) that:

> "nothing which we have said in passing upon this application for a preliminary injunction is to be regarded as a determination upon its merits of any of the questions presented by the petition."

The language quoted in the government brief from the District Court's opinion is followed by these significant sentences which are not quoted:

> "While we do not desire to foreclose the petitioner from asserting, upon the final hearing, the insufficiency of the findings to sustain the order complained of, the doubts which we entertain as to the adequacy of the findings are not sufficient to justify the issuance of a preliminary injunction."

The court based its refusal of a temporary injunction upon the fact that the record of evidence before the Commission was not before the court and it could not, therefore, inquire as to the support for the Commission's findings. It pointed out that while section 14 of the Interstate Commerce Act had been amended to relieve the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½, yet there has not been removed the necessity of making *quasi* jurisdictional findings essential to the constitutional or statutory validity of orders subject to judicial review.

On page 67 of the brief for Appellants reference is made to the decision announced January 23, 1937 by a statutory court for the Northern District of Indiana in *Elgin Joliet & Eastern Ry. Co. v. United States,* and *East Chicago Dock Terminal Co. v. United States,* described as "not yet reported." Counsel for the Commission have furnished copies of the opinion in that case to other District Courts in which are pending cases to review like Commission orders, including the group of cases recently decided by the District Court at New Orleans. The opinion of the Court for the Northern District of Indiana makes the decision turn squarely on the peculiar facts of that case, and describes the plaintiff as receiving a

"stand-by" service quite distinguishable from the situation at Pittsburgh. After discussing the facts and quoting the decision in the present cases, the Court said:

> "We agree with Judge Schoonmaker and his associates in the case we have discussed in the statement that the applicable decided cases hold that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required as is customary and reasonable."

It is thus apparent that neither the *Koppers Gas and Coke Case* nor the *Elgin, Joliet & Eastern Ry. Co. Case* can possibly be regarded as adjudications applicable to the cases at bar.

VII.

Conclusion.

It is perfectly obvious that the real purpose and effect of the orders of the Commission in these cases is to increase freight rates by the imposition of additional charges for the performance of services which the Commission, the carriers and shippers alike have long regarded as included in the service under the line-haul rates. The same proposal was advanced by the railroads in 1914, thoroughly investigated, branded as "revolutionary" and condemned by the Interstate Commerce Commission in 1915 in *Car Spotting Charges,* 34 I. C. C. 609, in an exhaustive opinion printed in the Appendix to this Brief. Similarly, intrastate rates in Pennsylvania have been established as including the spotting service since the opinion of the Public Service Commission of the Commonwealth of Pennsylvania in *National Tube Company et al. v. Baltimore & Ohio Rail-*

road Company et al. (1919), printed in the Appendix to this Brief.

The carriers themselves, whom the Commission seeks to benefit by its action, are in full accord with the views which we have expressed. We respectfully urge the Court to read the Brief of certain carriers, filed in this Court *amici curiae*. That Brief, with its abundant quotations from the Record, shows conclusively that the spotting service here involved is not in excess of team track or simple switching placement, that there is no such interruption or interference by the desires of the Appellees or the disabilities of their plants as to warrant the Commission in condemning the spotting services there performed, and that the payment of allowances of the character here involved is in conformity with efficient and economical management as contemplated by the Interstate Commerce Act.

Little wonder, in the state of the law and the record that in these very proceedings we find arrayed against the decision of the majority of the Commission the following:

(1) The Commission's own counsel in this investigation (Ex Parte 104, Part II, Terminal Services). See their memorandum served on counsel for the industries and filed with the Director of Service, printed in Appendix to this Brief, p. 16.

(2) All the railroads serving the territory where Appellees' plants are located, as evidenced by their brief filed in this Court, and by their Exceptions and Brief filed before the Commission.

(3) Commissioner Mahaffie of the Interstate Commerce Commission. (See his dissenting opinion, R. 43.)

(4) Judges Davis, Gibson and Schoonmaker, who composed the statutory Court which heard these cases below. See opinion (R. 531), findings of fact and conclusions of law (R. 571) and decrees (R. 574-577).

(5) Judges Foster, Borah and Kennerly, who composed a statutory Court in the Fifth Circuit, which set aside the orders of the Interstate Commerce Commission in nine cases arising out of the same report of the Commission as is here involved (Opinion is printed in Appendix to Appellee's Brief, p. 3).

We respectfully submit that the decision of the Court below should be affirmed.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Counsel for Appellee,
American Sheet & Tin Plate Company,

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Counsel for Appellees,
Allegheny Steel Company,
Pittsburgh Plate Glass Company,
Weirton Steel Company,
West Leechburg Steel Company.

WILLIAM W. COLLIN, JR.,
Of Counsel.

FILE COPY

OFFICE - SUPREME COURT, U. S.
FILED
APR 2 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

NO. 734

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY and PITTSBURGH PLATE GLASS COMPANY, Et Al.

Appeal From the District Court of the United States for the Western District of Pennsylvania.

APPENDIX TO BRIEF FOR APPELLEES.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Pittsburgh, Pa.,
Counsel for Appellee, American Sheet & Tin Plate Company.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Chicago, Ill.,
Counsel for Appellees, Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company.

Of Counsel,
WILLIAM W. COLLIN, JR.,
Pittsburgh, Pa.

SMITH BROS. CO., INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.
NO. 734

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY and PITTSBURGH PLATE GLASS COMPANY, Et Al.

Appeal From the District Court of the United States for the Western District of Pennsylvania.

APPENDIX TO BRIEF FOR APPELLEES.

As an aid to the Court we have compiled and file herewith an appendix to the Brief for Appellees containing four divisions as follows:

		PAGE OF APPENDIX
1.	Views of Judges Foster, Borah and Kennerly, who composed a statutory court in the Fifth Circuit, which set aside the orders of the Interstate Commerce Commission in nine cases arising out of the same Report of the Commission as is here involved	3
2.	The views of Messrs. Alfred G. Hagerty and Riley A. Gwinn, who appeared as Counsel for the Interstate Commerce Commission (Orig. Tr. Vol. I, page 1) in the present investigation (Ex Parte 104, Part II, Terminal Services) as set forth in Report filed with the Commission..	16

PAGE OF APPENDIX

3. The views of the Interstate Commerce Commission after a thorough investigation of the subject in 1915, as reported in *Car Spotting Charges*, 34 I. C. C. 609 59
4. The views of the Public Service Commission of the Commonwealth of Pennsylvania on the subject of spotting, as set forth in opinion filed February 18, 1919, in the cases of *National Tube Co. et al. v. The Baltimore and Ohio Railroad Co. et al.* 71

Certainly the views so expressed by the foregoing authorities are entitled to great weight in the determination of the issues here involved.

Respectfully submitted,

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Counsel for Appellee, American Sheet & Tin Plate Company.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Counsel for Appellees, Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company.

WILLIAM W. COLLIN, JR.,
Pittsburgh, Pa.,
Of Counsel.

EXHIBIT 1.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF LOUISIANA

PAN AMERICAN PETROLEUM CORPORATION, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 314 (New Orleans) (Division)
COLIN C. BELL and WM. TRACY ALDEN, Trustees of the Estate of THE CELOTEX COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 315 (New Orleans) (Division)
GREAT SOUTHERN LUMBER COMPANY, BOGALUSA PAPER COMPANY, Incorporated, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 317 (New Orleans) (Division)
STANDARD OIL COMPANY OF LOUISIANA, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 331 (Baton Rouge) (Division)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS

HUMBLE OIL & REFINING COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 690 (Houston) (Division)
MAGNOLIA PETROLEUM COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 691 (Houston) (Division)
THE TEXAS COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 692 (Houston) (Division)
GULF REFINING COMPANY, vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 693 (Houston) (Division)
THE TEXAS COMPANY vs. UNITED STATES OF AMERICA, ET AL	IN EQUITY No. 718 (Houston) (Division)

BEFORE FOSTER, CIRCUIT JUDGE, AND BORAH AND KENNERLY, DISTRICT JUDGES.

OPINION.

February 24, 1937.

Luther M. Walter, Nuel D. Belnap, John S. Burchmore, Walter, Burchmore & Belnap, of Chicago, Illinois, for Plaintiffs.
Elmer B. Collins, Special Assistant to the Attorney General, Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Nelson Thomas, Attorney, Interstate Commerce Commission, for Defendants.

February 24, 1937.

KENNERLY, District Judge:

These are suits in Equity in the District Court of the United States for the Eastern District of Louisiana (New Orleans and Baton Rouge Divisions) and for the Southern District of Texas (Houston Division) under the Act of Congress of October 22, 1913 (38 Stat. 219, Sections 41, 45, 46 and 47 of Title 28, U. S. C. A.) by the Plaintiffs (hereinafter named) against the Defendants (hereinafter named), to enjoin, restrain and set aside Orders of the Interstate Commerce Commission requiring that the Railroad Companies named as Defendants cease, desist from, and discontinue the payment to Plaintiffs of allowances for performing certain terminal services hereinafter more fully set out and generally referred to as "spotting."

The Original Report of the Commission, on which Orders complained of are based, is reported as:

Propriety of Operating Practices, Terminal Services, 209 I. C. C. 11.

Supplemental Reports, on which Orders complained of are also based, will be found in the printed Reports of the Commission, as follows:

[1]Mexican Petroleum Corporation of La. Inc. Terminal Allowance, 209 I. C. C. 394.

Celotex Company Terminal Allowance, 209 I. C. C. 764.

Great Southern Lumber Company—Bogalusa Paper Company Terminal Allowance, 209 I. C. C. 793.

Standard Oil Company of Louisiana Terminal Allowance, 209 I. C. C. 68.

Humble Oil & Refining Co. Terminal Allowance, 209 I. C. C. 727.

Magnolia Petroleum Company Terminal Allowance, 209 I. C. C. 93.

Texas Company Terminal Allowance at Houston, Tex., 209 I. C. C. 767.

Gulf Refining Company Terminal Allowance, 209 I. C. C. 756.

Texas Company Terminal Allowance at Port Arthur, Texas, 44th Supplemental Report.

There were applications for Interlocutory Injunctions which were heard by a Three-Judge-Court organized under Section 47, Title 28, U. S. C. A., and granted, and the cases have now been heard together, on one Record, on the merits by the same Court, and may be disposed of in one opinion.

(a) No. 314 is a suit by the Pan American Petroleum Corporation, Plaintiff, against the United States of America, The Yazoo & Mississippi Valley Railroad Company (for brevity called Y. & M. V. Ry. Co.), and the Illinois Central Railroad Company, with the Interstate Commerce Commission intervening. Plaintiff is the successor of the Mex-

---

[1] Pan American Petroleum Corporation, petitioner in No. 314, In Equity, is successor to the Mexican Petroleum Corporation of Louisiana, Incorporated, in ownership and operation of Destrehan refinery.

ican Petroleum Corporation of Louisiana, Incorporated (for brevity called Mexican Corporation), and owns and operates as did Mexican Corporation, at Destrehan, Louisiana, on the line of the Y. & M. V. Ry. Co. a large oil refinery plant. The plant is situated south of and adjacent to the tracks of the Y. & M. V. Ry. Co. There are within the plant enclosure, tracks which connect with the tracks of Ry. Co., and are used for the transportation of cars moving in interstate commerce between the places where they are loaded and unloaded within the enclosure of the plant and the Ry. Co.'s tracks, the service of such transportation being performed, formerly by Mexican Corporation and now by Plaintiff under a tariff promulgated by the Ry. Co., reading as follows:

> "Terminal Allowances to the Mexican Petroleum Corporation of Louisiana at Destrehan, La.
>
> On traffic to and from points on or reached via The Yazoo and Mississippi Valley Railroad Company or connections.
>
> On all carload shipments (including trap cars containing 10,000 pounds or more of less-carload freight) destined to or coming from the plant of the Mexican Petroleum Corporation of Louisiana at Destrehan, La., the terminal switching service is performed by the Mexican Petroleum Corporation of Louisiana for account of The Yazoo and Mississippi Valley Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this Company and the point at which such cars are unloaded, or

the point at which such cars are loaded in said plant.

For such terminal service performed for The Yazoo and Mississippi Valley Railroad Company by the Mexican Petroleum Corporation of Louisiana, at Destrehan, La., the Mexican Petroleum Corporation of Louisiana will be allowed 90 cents per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in a joint study of the operations of the plant facility made during period June 4, 1929, to June 8, 1929, inclusive, also June 10, 1929, and filed with the Interstate Commerce Commission."

The cease and desist Order of the Commission of which Plaintiff complains as requiring Defendant Railroads to cease and desist making such allowance, under such Tariff, is dated June 25, 1935, and is as follows:

"Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by The Yazoo and Mississippi Valley Railroad Company to the Mexican Petroleum Corporation of Louisiana, Incorporated, for performance by the latter of spotting service within its plant at Destrehan, La., and the Commission having under date of May 14, 1934, made and filed a report Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the division having on the date hereof made and filed a supplemental re-

port containing its findings of fact and conclusions with respect to the allowance paid to the Mexican Petroleum Corporation of Louisiana, Incorporated, which reports are hereby referred to and made a part hereof, and the division having found in said supplemental report that by the payment of said allowance The Yazoo and Mississippi Valley Railroad Company violates the Interstate Commerce Act as set forth in the above-mentioned reports:

It Is Ordered, That The Yazoo and Mississippi Valley Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 22, 1935, and thereafter to abstain from such unlawful practice.

By the Commission, Division 6."

(b) No. 315 is a suit by Colin C. Bell and Wm. Tracy Alden, Trustees of the Celotex Company, Plaintiffs[2] (for brevity called Celotex Corporation), against the United States of America, Texas & New Orleans Railroad Company (for brevity called T. & N. O.), the Texas & Pacific Railway Company (for brevity called T. & P.), the Missouri Pacific Railroad Company (L. W. Baldwin and Guy A. Thompson, Trustees) (for brevity called M. P.), and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans (for brevity called Terminal Co.), with the Interstate Commerce Commission intervening.

Celotex Corporation (as did its predecessors) owns and operates a plant for the manufacture of celotex board, manufactured principally from bagasse, the dried refuse of sugar cane. The plant

---

2 Since the institution of the suit, the Trustees have been succeeded by the Celotex Corporation of Delaware.

is located at Marrero, Louisiana. The plant is served by the three Defendant Railroads (T. & N. O., T. & P., and M. P.), the terminal Company performing the switching for the T. & P. and the M. P.

The plant is in two sections which are separated by the tracks of the T. & N. O. and the Terminal Company. As in case No. 314, there are tracks used for the transportation of cars moving in interstate commerce between the tracks of the T. & N. O. and the tracks of the Terminal Company, upon the one hand, the place or places within the plant enclosure, where cars are loaded and unloaded, the service of such transportation being performed by Celotex Corporation (and by its predecessors), for which, first under agreements openly made, and later under tariffs, duly promulgated, an allowance was made Celotex Corporation.

The Order of the Commission of which Plaintiff complains seems to require the Defendant Railroads to cease and desist making such allowance.

(c) No. 317 is a suit by the Great Southern Lumber Company (for convenience called Lumber Company) and Bogalusa Paper Company, Incorporated (for convenience called Paper Company), Plaintiffs, against the United States of America, Gulf, Mobile and Northern Railroad Company, with the Interstate Commerce Commission intervening.

Lumber Company is engaged in the lumber and logging business, and the Paper Company in the paper manufacturing business. They together occupy a large industrial area near Bogalusa, Louisiana. Adjacent to them, but in no manner connected with them, are three other industrial plants, which are referred to for convenience as adjacent plants. As in case No. 314, there are tracks used for the

transportation of cars moving in interstate commerce between the tracks of Railroad Company and the point or points where cars are loaded or unloaded by Lumber Company and Paper Company and adjacent plants. Lumber Company performs this service of transportation not under a regular tariff such as was promulgated in No. 314, but in the form of monthly lump sum reimbursements by the Railroad Company, for wages and costs of materials and supplies used in connection with such work. The Order of the Commission complained of seeks to require the Railroad to cease and desist making such lump sum monthly payments.

(d) No. 331 is a suit by the Standard Oil Company of Louisiana, Plaintiff, against the United States of America, Illinois Central Railroad Company, Yazoo & Mississippi Valley Railroad Company, Louisiana & Arkansas Railway Company, and the New Orleans, Texas & Mexico Railway Company (Baldwin and Thompson, Trustees), with the Interstate Commerce Commission intervening.

Plaintiff owns, maintains and operates an oil refinery (one of the largest in the world) at North Baton Rouge, Louisiana. As in Case No. 314, there are tracks connecting those belonging to or used by the Railroad Defendants with the place or places where cars are unloaded in the plant, and over which tracks cars moving in interstate commerce are transported by Plaintiff under a tariff which makes Plaintiff an allowance for such service. The Order of the Commission complained of seeks to require the Defendant Railroads to cease and desist making such allowance.

(e) No. 690 is a suit by the Humble Oil & Refining Company, Plaintiff, against the United States

of America, the Texas & New Orleans Railroad Company, Missouri Pacific Railroad Company (Baldwin and Thompson, Trustees), the Beaumont, Sour Lake and Western Railway Company (Baldwin and Thompson, Trustees), Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns and operates a large oil refinery at Baytown, Texas, which is served by the Railroad Defendants. Tracks connect numerous locations for loading and unloading cars within the Refinery property with the tracks of the Railroad Companies, over which tracks cars moving in interstate commerce are transported by Plaintiff, and for which Plaintiff is made an allowance under tariffs of the Railroads. The Order complained of required the Railroads to cease and desist making such allowance.

(f) No. 691 is a suit by the Magnolia Petroleum Company, Plaintiff, against the United States of America, the Kansas City Southern Railway Company, and the Texas & New Orleans Railroad Company, Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns and operates an oil refinery at Chaison, Texas. The Railroad Defendants have tracks adjacent to such refinery, and there are tracks leading thereform to the loading and unloading points within the refinery property, over which tracks cars moving in interstate commerce are transported by Plaintiff, and for which Plaintiff is made an allowance under tariffs of the Railroad Companies. The Order complained of requires the Railroads to cease and desist making such allowance.

(g) No. 692 is a suit by the Texas Company, Plaintiff, against the United States of America, the Texas & New Orleans Railroad Company, the Missouri Pacific Railroad Company (Baldwin and Thompson, Trustees), the International-Great Northern Railroad Company (Baldwin & Thompson, Trustees), the Beaumont, Sour Lake and Western Railway Company (Baldwin and Thompson, Trustees), the St. Louis, Brownsville & Mexico Railway Company (Baldwin and Thompson, Trustees), the Atchison, Topeka & Santa Fe Railway Company, the Gulf, Colorado & Santa Fe Railway Company, the Missouri-Kansas-Texas Railroad Company of Texas, and the Burlington-Rock Island Railroad Company, Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns a plant at Houston, Texas, referred to as the Galena-Signal Plant, served by the Defendant Railroads, but the Port Terminal Railroad at Houston generally performs switching services for the Railroads. Plaintiff, however, transports cars moving in interstate commerce over tracks between those of the Railroads and Terminal Company and the point within the plant where cars are loaded or unloaded, for which Plaintiff is made an allowance under tariffs promulgated by the Railroad Defendants. The Order of the Commission complained of directs the Railroad Defendants to cease and desist making such allowance.

(h) No. 693 is a suit by the Gulf Refining Company, Plaintiff, against the United States of American, the Texas & New Orleans Railroad Company, and the Kansas City Southern Railway Company, Defendants, with the Interstate Commerce Commission intervening.

Plaintiff owns and operates a Refinery Plant at Port Arthur, Texas, which is served by the Defendant Railroads. Over tracks leading from the point or points of the loading or unloading of cars, Plaintiff transports cars moving in interstate commerce, receiving therefor an allowance under tariffs of the Railroad Defendants. The Order complained of directs the Railroads to cease and desist making such allowance.

(i) No. 718 is a suit by the Texas Company, Plaintiff, against the United States of America, the Interstate Commerce Commission, the Texas & New Orleans Railroad Company, and the Kansas City Southern Railroad Company.

Plaintiff is engaged in the refining, manufacture and sale of petroleum and its products, and owns and operates three plants, known as the Asphalt Plant at Port Neches, the Island Plant, and the Refinery Plant at Porth Arthur, Texas. All of the Plants are large and extensive in size, and are served by the Defendant Railroads. Over tracks connecting the point or points of loading and unloading with the tracks of the Railroad Companies. Plaintiff transports cars moving in interstate commerce, for which it receives an allowance under tariffs of the Railroad Defendants. The Order complained of directs the Railroads to cease and desist making such allowance.

Except in No. 317, where the allowance is in the form of a monthly lump sum, the Tariff quoted in the statement in No. 314 is typical of the tariffs in the other cases; and the Order of the Commission there quoted is typical of the Order complained of in the other cases.

The Defendant Railroads, in obedience to such Orders of the Commission, undertook to cancel and discon-

tinue the allowances set forth in such Tariffs, and these suits followed.

1. The first question is whether the work in transporting, switching and spotting cars, for which the Plaintiffs herein were paid, or were made an allowance under the Tariffs, is a service which the Railroads involved are required to perform as transportation or a part of transportation.

We think that under the evidence, the question must be affirmatively answered. We think it clear that the Railroads involved are required, under the Law, to perform such service as a part of transportation. Subdivisions 3, 4, 5 and 6, Section 1, Title 49, U. S. C. A.; *C. & O. Ry. Co. v. Westinghouse Co.*, 270 U. S. 265, 70 L. Ed. 576; *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 264, 57 L. Ed. 576; *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 217, 58 L. Ed. 924; *Los Angeles Switching Case*, 234 U. S. 310, 58 L. Ed. 1319.

There is no evidence that such Railroads are prohibited by the Plaintiffs from performing such service, nor that there are physical conditions which prevent them from doing so. Indeed, there appears to be no "abnormal conditions" of any kind which would serve to relieve the Railroads involved of the duty. *C. & O. Ry. Co. v. Westinghouse, supra.*

2. Having the duty to perform the service, the Railroads involved properly and lawfully contracted with the respective Plaintiffs to perform it, and properly and lawfully made such Plaintiffs allowances therefor in their Tariffs. *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. Ed. 83; *Mitchell Coal & Coke Co. v. Penna. R. R. Co.*, 230 U. S. 247, 57 L. Ed. 1472; *Atchison, Topeka & Santa Fe Railway Co. v. U. S.*, 232 U. S. 199, 58 L. Ed. 568.

3. While the Commission without doubt has the power (Par. 1, Sec. 15, Title 49, U. S. C. A.) to determine whether such allowances are reasonable or unreasonable in amount, whether they do or do not give the Plaintiffs an unlawful preference, or whether they unlawfully discriminate against others similarly situated, etc. (*Interstate Commerce Com. v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431; *Southern Pacific Co. v. Interstate Commerce Com.*, 219 U. S. 433, 55 L. Ed. 283, *Interstate Commerce Com. v. Stickney*, 215 U. S. 98, 54 L. Ed. 112; *Interstate Commerce Com. v. Northern Pacific Ry. Co.*, 216 U. S. 538, 54 L. Ed. 608; *United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 79 L. Ed. 587), we think that under the evidence here, the Commission was without power to wholly prohibit such allowances.

4. To support a cease and desist order because the rate or practice is unreasonable, preferential, discriminatory, etc., there must be the necessary jurisdictional findings of fact by the Commission. *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 294 U. S. 499, 79 L. Ed. 1023; *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U. S. 193, 79 L. Ed. 1382; *Florida v. United States*, 282 U. S. 194, 75 L. Ed. 291; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283; *Beaumont, Sour Lake & Western Ry. Co. v. United States*, 282 U. S. 74, 75 L. Ed. 221. No sufficient findings appear either in the Orders themselves, or in the Reports which are made a part of the Orders.

It follows that Plaintiffs are entitled to the relief for which they pray.

Let Decree be drawn and presented accordingly, along with suggested Findings of Fact and Conclusions of Law if desired. The Court reserves the right to file

Findings of Fact and Conclusions of Law in either or all the cases upon request of any party.

Feb. 24, 1937:

The Clerk will file this Opinion and notify the attorneys for the respective parties.

(Sgd) T. M. KENNERLY,
Judge.

EXHIBIT 2.

The views of the counsel for the Interstate Commerce Commission in the present investigation (*ex parte* 104, Part II, terminal services) as set forth in the following report filed with the Commission:

January 3, 1933.

SUBJECT: Ex-Parte No. 104, Part II, Terminal Services. The placement of cars on private industrial tracks in accessible positions for loading and unloading.

THE SUBJECTS OF INQUIRY:

This part of the much broader inquiry instituted by the Commission's order of July 6, 1931, gave rise to two questions concerning the terminal switching services performed on private industrial tracks in the placement of cars in accessible positions for loading and unloading. In substance these questions are:

1.—Whether such services in whole or in part are common-carrier services which, by operation of law, the carriers are duty-bound to perform; and

2.—Whether, where the industries perform such services, the compensation allowed them by the carriers is lawful; including the further inquiry as to why compensation is not allowed to all industries that perform such services.

They are addressed to three distinct methods of rendering such services, classified as follows:

Group A: Where the industries perform the services and receive compensation, in the form of "allowances" from the carriers;

Group B: Where the industries perform the services and themselves bear the expense without compensation from the carriers; and

Group C: Where the carriers perform the services at the special convenience of the industries.

The occasion for the inquiry was accumulated information—having its source in routine field investigations, and reflected also in numerous formal and informal complaints—disclosing many inequalities and discriminations, at least *prima facie* unlawful, associated with both the performance of the services and the payment of allowances; and further disclosing that for more than a decade the carriers[1] unsuccessfully had been attempting to eliminate such results, as well as to bring both the services and allowances more nearly within what they conceived to be their common-carrier obligation in such matters, by establishing uniformity and also by eliminating wasteful practices regarded as a constantly growing menace against their revenues.

The marginal note[1], set there merely to show in a general way the circumstances which prompted the investigation, is but a narrow outline of the situation as it existed in the years 1920-1921, and as it existed Novem-

---

[1] Their own summary, in September, 1920, as related to terminal allowances paid to industries, describes such allowances as the cause of much litigation before the Commission, and as continuing to be "a source of serious controversy and dissatisfaction on the part of many shippers"; adding, that for some time, they, the carriers, had been anxious to find a plan which would "meet all the requirements of the law and operate satisfactorily to their patrons" (Ex. C-139, R. A.-7616). A special committee representing railroads operating in official classification territory, organized to deal with "spotting service on private or industrial tracks", met in Pittsburgh, Pa., June 29, 1921, and specified

ber 21, 1932, when the taking of testimony in this proceeding was closed. No substantial or effective progress appears to have been made in correcting what the carriers considered, and themselves described, to be unjustifiable inequalities and questionable discriminations. Basic uniformity, although attempted, has not been reached, apparently because of variations in policy and differences of opinion as to what may or may not be lawfully done in rendering such services.

Merited, or unmerited, these observations, made as they were by experienced railroad officials in practical contact with the subject—and predicated upon the deliberations and study between them through committees organized and functioning for that purpose—were sufficient to raise inquiry as to whether the law was being violated in rendering these "spotting services," or in the payment of allowances, and particularly whether

---

nine particulars in which it deemed "a remedy" necessary, sending those particulars forward to the Traffic Executive Committee for consideration. (Ex. C-139, R. A.-7616, document 4-1063). These particulars emphasized the differences in bases on which allowances were granted; the granting of allowances to some industries and not to others; the industrial engine-hour cost chargeable to industrial, rather than to common-carrier, services, which the carriers were improperly bearing through the payment of allowances; the accommodation of such services to the "convenience of the plant" without regard to carriers' convenience; the demands for increases in the amounts of allowances then being made; and the saddling upon the carriers of other burdens, arising in connection with such services, which were chargeable against the industries. That committee also pointed out that shortly after the termination of Federal control, the traffic executives of official classification territory—"appreciating the importance of uniformity and the necessity for avoiding possible unjust discrimination"—had appointed a special committee to develop, if possible, a practicable method of applying the principles laid down by the Commission; and that the special committee had recommended the establishment of uniform tariff rules to govern the particulars and extent to which the line-haul rates included spotting services. In terms the suggested tariff—which never was adopted or filed, and for descriptive purposes has been called the "rainbow tariff" read as follows:

the prevailing practices unjustly burden the operating revenues and operating expenses of the railroads against the interests of the public as a whole.

The statutory duty of the commission is to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers, and to make orders which will nullify such practices in "whatever form they take and in whatsoever guise they may appear". *O'Keefe v. United States*, 240 U. S. 294; 36 S. Ct. 313. Also, it must keep informed as to whether the railroads are being operated honestly, efficiently, and economically, within the meaning of section 15 of the Interstate Commerce Act. Of course, the commission is without power to supend administration of the law upon considerations of expedience, convenience, or any other grounds.

NATURE OF SPOTTING SERVICE:

The occasion for pursuing the inquiry, and the duty to do so, thus having been established, attention will now be given to the governing law.

"The transportation road-haul rates on carload freight lawfully applicable to and from private or industrial sidings will include the service of spotting loaded and empty cars for inbound and outbound movements under the following conditions:

(a)—Where spotting service on private or industrial sidings requires only one simple switching movement, which is performed by carrier's power, without interference by the industry;

(b)—Spotting service as described in 'a' when performed for account of industries where plants cover large areas and/or have a system of tracks, shall begin and terminate at a designated and agreed interchange yard or track.

(c)—Any service or spotting by the carrier in excess of the service as provided for above shall be subject to a charge or $.....

(d)—At any industry where the carrier arrangea with the industry to perform the spotting service as described in (a) or (b), for the account of the carrier, an allowance therefor amounting to $....., will be paid.

First, as to the nature of the spotting service, in the aspect of whether or not it is a common-carrier service: In express terms the statute (Sec. 1-(3)), defines "transportation" by railroad to include "all services in connection with the 'receipt' and 'delivery', • • • of property transported"; also it includes "cars," to be supplied by the carriers. Hence, the supplying of the car, the receiving of property in carload quantities for transportation, and delivery of the property after transportation, are all essential incidents of "transportation" as defined by the statute, and include the placement of the cars in positions accessible to the consignors and consignees, respectively, for loading and unloading. By long continued custom and practice—now embedded in the law—such placements are made on the carriers' tracks,

---

Failing, because of strong opposition by the shippers, including the National Industrial Traffic League, in their efforts to restrict application of their line-haul rates to the measure of spotting service defined in the suggested rainbow tariff, the carriers continued searching for ways and means to eliminate from allowances all cost factors which are not incurred in the uninterrupted movements between their interchange-track connections with the private industrial tracks, and the locations on such private industrial tracks where the cars are finally spotted for loading and unloading. A formula for determining the amount of allowances to be paid industries for the performance of "spotting" services was finally adopted. (Ex. 106). That formula, revised down to July 18, 1929, embodied rules reading as follows:

> "Rule 6. The allowance to a Plant for terminal service shall be the same amount for each connecting Railroad and shall not exceed the amount it would cost the Railroad to perform the same service with its own locomotives, *at its convenience, without interruption or interference*. The cost of Railroad operation to be in each case determined from available data by the Study Committee". (Italics for emphasis.)
>
> "Rule 8. The service between point of interchange and point of loading or unloading, as the case may be, shall be charged to the Railroad, provided it is a progressive movement to point of placement or delivery, performed *without plant interruption or interference. If plant interruption or interference is encountered, the service after such interruption or interference shall be charged to the plant*. (Italics for emphasis.)

within their own established terminals and on their own rights-of-way; also they are made on private industrial tracks off the carriers' rights-of-way, and on the private property of the industries served by them. Such services are included in the established transportation rates, unless, in express terms, the carriers' tariffs, published in the manner prescribed by section 6 of the statute, provide otherwise. *Interstate Commerce Com. v. Stickney*, 215 U. S. 98, 30 S. Ct. 66; *Car Spotting Charges*, 34 I. C. C. 609.

These principles have been so firmly established by long continued and wide application that the citation of other authorities to sustain them is unnecessary. The inescapable conclusion thus reached is that, in nature the "spotting services" are recognized, *ipso jure*, as common-carrier service, to which the shippers are entitled, and which the carriers are duty-bound to perform; so much so, that the writs of mandamus, or mandatory injunction, will lie to enforce the right and compel the duty. *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612.

Then followed Rule 9, which is a partial list of what shall be considered as plant interruption or interference within the meaning of Rule 8. Among these are "(a) convenience of the Plant, such as service in excess of normal operations; (b) plant operations that interrupt or interfere with movements of switch locomotives; (c) holding of cars for advice from plant as to disposition", etc.

The formula was used solely for the purpose of measuring the allowances, and although it defined the services which the carriers conceived to be covered by their rates, the definition and description there given was wholly ignored where the services were being rendered with their own power. The formula was in no sense mandatory. The effort was to restrict the allowances to iron and steel industries, and to compute them on basis of 1916 costs, but in this there was neither consistency nor measurable success. The spotting services which the carriers define as covered by their line-haul rates, for the purposes of measuring allowances are, as elsewhere more particularly described, substantially less in measure and value than those performed by them with their own power without charge in addition to the line-haul rates

ESTOPPEL BY THOSE OTHERWISE ENTITLED TO SERVICE:

Second, the considerations, if any, which will relieve the carriers from performing this common-carrier duty are now to have attention. In reference to the described common-carrier obligation, there are circumstances which will materially lessen, and sometimes wholly avoid what otherwise would be the duty of the carriers. Categorically, and in effect, as against the consignor or consignee, these are tantamount to estoppel of demands they otherwise could enforce for spotting services, ordinarily capable of performance, but which, by their own acts, are rendered incapable of performance by the carriers. Typical of these circumstances are: (a) where the industry refuses to permit the carriers' locomotives to enter in and upon the private industrial tracks for the purpose of performing that service; (b) where the physical condition of the private industrial tracks—due to lack of adequate maintenance, excessive curvatures, light weight of rail, numerous crossovers, turn outs, switches, or other obstacles—will not reasonably accommodate the carriers' power without hazard or excessive delay; (c) where the industrial plant occupies large areas over which are scattered many separate plant units, connected by systems of industrial tracks, used chiefly or exclusively as industrial facilities for industrial purposes, and over which plant power operates in the daily intramural movements and shiftings essential in distributing materials and products to particular locations for convenient and immediate use in industrial processes.

Where the carriers are prevented from freely performing their common-carrier duties by any of the obstacles described in the preceding paragraph, especially those within the descriptive designation "(c)", more par-

ticularly outlined in the margin[2], they are relieved, at that point where the obstacles are encountered, from going beyond—without compensation in addition to the established transportation rates—for the purposes of placing cars on private industrial tracks in accessible positions for loading or unloading at designated locations; the services beyond those points over the private industrial tracks, to or from the desired locations, under such circumstances, not being common-carrier services included within the established transportation rates.

---

2 Typical of this class, and comparable with numerous other industries described of record—in size, number of separate plant units, number of "spotting" locations, length and lay-out of the private industrial tracks, and the volume of traffic—is the plant of the General Electric Company, Schenectady, N. Y., which, as it existed in November, 1916, was described as composed of 180 acres, on which were 140 separate buildings, 12 miles of standard gauge track, 7 miles of narrow gauge track, 18 spotting locations, and where the volume of inbound and outbound traffic consisted of about 200 cars daily. The industry operated 6 standard gauge electric locomotives in moving cars on the described tracks, and 19 motors in shifting materials between the store houses, shops and mills. *New York Cent. & H. R. R. Co. v. General Electric Co.*, 219 N. Y. 277; 114 N. E. 115, 116, decided Nov. 3, 1916. The suit in the case here cited was brought by the Railroad against the Electric Company for the recovery of unpaid freight charges. The Electric Company entered a counterclaim based upon compensation alleged to be due it for switching cars on its plant tracks for the Railroad, under an agreement that such compensation would be paid out of the freight rates. (114 N. E. 115). The validity of the agreement was the question for determination; the Railroad having committed a breach by discontinuing the payment of compensation (allowance out of the freight rates) to the Electric Company after November, 1905. In a more precise definition the Court said (p. 117) "The decisive question must therefore be whether the switching done by the defendant (Electric Co.) within its plant between the storage tracks (interchange tracks) and the platforms of its mills is work that the plaintiff (Railroad) was bound to do as a part of transportation. To put it in another form, the question is, where does transportation begin and end?" In substance, the judgment of the Court was that the service for which the Electric Company was claiming compensation under the agreement, was not a common-carrier service of transportation, but the convenient distribution of wares among the subdivisions of the industry.

The test of whether such preventive obstacles are actually present in a given circumstance, and are of material, continuing effect against the carriers' ability freely to perform, is often difficult to apply, turning, as it does, on special questions of fact concerning the situation that exists at each industry, and the nature of any special and particular services there demanded of the carriers.

In distinguishing between ordinary "spotting" in the delivery on private sidings, and the more special and particular delivery in conveniently distributing the wares of industries among the subdivisions of their plants over systems of private industrial tracks, Justice Cardozo, in the *General Electric case*, decided November 3, 1916, cited in the margin, characterized the test as "vague," and the difference "one of degree," adding, however, that "as so often in the law, such differences are vital". Earlier, in the *Los Angeles Switching case*, 234 U. S. 294, 310, decided June 8, 1914, particular notice was taken of the distinction by Justice Hughes; and again it was specially observed by the Commission July 6, 1915, in *Car Spotting Charges*, 34 I. C. C. 609, 618, 620. No exact dividing line or point of cleavage was established in any of these cases; nor could there be, because, as pointed out by Justice Cardozo in the *General Electric case, supra*, p. 117:

> "In the nature of things no inflexible formula can furnish a solution of that problem. The limits of place within which delivery is due will vary with varying conditions"; citing *Mitchell Coal & Coke Co. v. Penna. R. Co.*, 230 U. S. 247.

This fact is borne out by the testimony in the present proceeding, showing a variety of different circumstances and conditions under which the "spotting" services are either performed or paid for by the carriers; from which the conclusion must be reached that the question is one for local consideration in reference to

each separate industry, and not open to control by omnibus inflexible rule.

But the cited cases—and others on the subject to which reference will be made in appropriate place—are significant in another aspect: None of them go so far as to hold, as a matter of judicial determination, that the placement of cars on private tracks in accessible positions for loading and unloading—even where in some measure the described obstacles are present, and where the performance and its incidents accomplishes the "convenient distribution of wares among the subdivisions of an industry"—is a service which the shipping public may not demand of the carriers in return for reasonable compensation in addition to the established transportation charges; or a service that the carriers may refuse to perform for reasonable compensation in addition to the transportation rates. Observing this side of the question, Justice Cardozo pertinently remarked:

> "We are asked * * * whether it can be 'the policy of the nation to prevent the most economical production of manufactured goods or to compel the defendant (General Electric Co.) to cart its vast shipments from cars placed upon the plaintiff's (Railroad's) own side tracks remote from defendant's works'. The assumed alternative is an unreal one. The question is not whether switching within the plant shall cease. The question is, who shall pay for it? To compel the plaintiff (Railroad) to pay by deduction from the regular rates or any service not a part of transportation (covered by those rates) is to prefer defendant (General Electric Co.) over others. *Armour Packing Co. v. U. S.*, 209 U. S. 56, 72; 28 S. Ct. 428. It is not the policy of the nation to place business clogs upon commerce, but it is the policy of the nation that preferences shall be impossible." *General Electric case, supra*, p. 119.

In the *Car Spotting case, supra*, the commission observed, p. 618, that:

> "The mere fact that many individual plants are operated together as a single industry does not deprive the industry of the right to such a service ("spotting") in the receipt and delivery of carload freight at each of the several plants as that plant would be entitled to have if it were operated separately, unless the collective operation so far removed the necessity for such a service as to make it unreasonable for the industry to demand the service."

Also, it observed that:

> "There may be cases in which the spots at which cars are placed for loading and unloading in complex industries are so located that the request for the receipt and delivery of carload freight at such spots could not, in view of general usage, be regarded as reasonable, and *where a charge for the spotting service in addition to the line-haul rate might therefore be justified,* but the mere fact that an industry is complex, or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for the receipt and delivery of carload freight." (Italics for emphasis.)

Later, the Commission sustained charges in excess of the line-haul rates for special spotting services. *Railroad Commissioners of Florida v. F. E. C. Ry. Co.,* 42 I. C. C. 616, January 3, 1916; and in a number of cases—important among which are *Carey Mfg. Co. v. Director General,* 59 I. C. C. 640; *United States Cast Iron P. & F. Co. v. Director General,* 57 I. C. C. 677; *Jackson Iron & Steel Co. v. Director General,* 77 I. C. C. 110; 91 I. C. C. 201—it found that the described "spotting", performed by the industries, for which allowances were being paid them by the carriers, apparently were services in excess of those which reasonably could be regarded as services within the line-haul rates.

But refusal by the carriers to perform even the described special and particular services, at reasonable compensation in excess of the line-haul rates, upon the ground that such services may not be compelled, has never been upheld, and apparently never has been judicially determined—either affirmatively or negatively—upon direct issue raised, under the circumstances here outlined.

Such services clearly are essential physical incidents in receiving and delivering carload freight, and by their very nature justify the conclusion that where possible of physical performance by the carriers—despite their special and particular character, and despite the elements of interference, delays, and probable excessive operating costs, all arising out of conditions for which the industry is responsible—they nevertheless are services which may be demanded of the carriers for reasonable compensation in excess of the line-haul rates, and therefore are common-carrier services.

Where such services are of the special and particular character here described, not included in the established line-haul rates, they are of a nature that affects the "value of the service rendered to the shipper or consignee," within the meaning of section 6 of the regulating statute; and, whether rendered gratuitously, or at a special charge in addition to the line-haul rates, the tariffs must expressly so provide, in certain and definite terms.

SERVICES WHICH THE CARRIERS
ARE PRIVILEGED TO PERFORM:

Third, the foregoing considerations, it will be observed, relate to the common-carrier duty of spotting cars, which, *ipso jure,* may be compelled; and to the circumstances where that duty may either be modified or wholly avoided—such as the presence of the described

preventive obstacles placed in the way by the industries, which obstruct the carriers' freedom of performance.

The authorities thus far cited, all of them, are instances where the carriers were defending themselves against claims for such services without charge in addition to the established transportation, or line-haul, rates; these being circumstances quite distinct and different from instances where the carriers, without charge in addition to the line-haul rates, voluntarily perform such services, under conditions, where they may not be compelled to do so.

There are many so-called free, and accessorial services; such as transit, reconsignment, concentration, storage, and others, all incidents of conducting transportation, which, in the absence of unlawful discrimination, may not be compelled without charge in excess of the regular transportation rates. So here, in reference to these spotting services, incident to receiving and delivering carload freight, the carriers are privileged—so long as they observe the statutory inhibitions against unlawful discriminations—to render services in excess of those which reasonably may be required of them, without assessing charges in addition to their established transportation rates. They may bring coal, or pay for moving it, over private tracks from the mines to their own tracks, over considerable distances, without charge in addition to their transportation rates. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247. Similarly, they may move lumber, or pay for moving it, from mills, located substantial distances off their rails, over the industrial tracks of the lumber companies, to their own tracks, and include such services in their established lumber rates. *Tap Line Cases*, 234 U. S. 1. They may, and generally do, reach industries off their own tracks by absorbing out of their rates the switching charges of the switching carriers; and such switching charges, like the line-haul

rates, generally include the placement of the cars in accessible positions for loading and unloading on private industrial tracks.

These are matters of long continued custom and practice, embedded as such into the law; and with which the law interferes only where rebating, unjust discrimination, undue prejudice, or undue preference, is shown to exist. Besides, the rendition of these so-called accessorial services, free of any charge in excess of the transportation rates, may properly be regarded—and in most instances probably is regarded—as a sound transportation business policy productive of revenue increases, rather than being burdensome against either railway operating revenues or railway operating expenses. Of this the Supreme Court of the United States took notice in *Interstate Commerce Com. v. Stickney,* 215 U. S. 98; 30 S. Ct. 66, stating:

> "The carrier is under no obligation to charge for terminal services. *Business interests may justify it in waiving any such charge,* and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it." (Italics for emphasis.)

In this period of growing competition with motor trucks —such facilities reaching the loading and unloading platforms of the widely scattered industrial units—the expected tendency, dictated by prudent business economies, is to extend, rather than to diminish, terminal services of the kind here described; and so long as that policy, in its practical application, is kept free from unjust discrimination, the carriers are privileged to continue it, and the shippers are entitled to the benefits.

Assuming then, that the premises are correct, it follows that there is nothing, unlawful or inherently wrong with the practice, as such, of gratuitously rendering spotting services which, in measure and value, exceed those which reasonably may be demanded without

charge in addition to the regular line-haul freight rates; providing, of course, that the carriers' tariffs, in terms, meet the requirements of the statute and subject also to the modification already alluded to, that a rule or practice, *prima facie* lawful and reasonable, may, in its practical application, become unlawful and unreasonable, in giving rise to unjust discrimination, undue preference and undue prejudice—matters, which, however, are left for separate consideration.

Related to these services—and intentionally ignored up to this point, but now to have attention—are the instances where the carriers engage the industries to perform the work and compensate them out of their rates by payment of the so-called "allowances."

ALLOWANCES TO INDUSTRIES
IN LIEU OF SERVICES:

Fourth, whatever services the carriers themselves may be compelled to perform in conducting transportation—including the spotting of cars—they may engage others, including the shippers and owners of the property transported, to perform for them; and for that service they may pay reasonable compensation out of their freight rates without violating the law. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.,* 230 U. S. 247; 33 S. Ct. 916, 923, Interstate Commerce Act, Section 15 (13).

Unless excluded by express terms of the tariffs in which the applicable rates are published, such rates are deemed to include the placement, or "spotting," of cars on both the carriers' tracks and on private industrial tracks, within customary and reasonable bounds; and, of course, in positions accessible for loading and unloading, as heretofore stated. *Car Spotting Charges,* 34 I. C. C. 609, 616; *Interstate Commerce Comm. v. Stickney,* 215 U. S. 98; 30 S. Ct. 66. But they are not deemed to include special or particular spotting services of the

character elsewhere herein described, which the carriers may not reasonably be required to perform without charge in addition to their line-haul rates. Accordingly, the carriers may, in the form of allowances, pay shippers for the performance of spotting services which are deemed to be included in the tariff rates; provided only that such allowances are reasonable and published in conformity with the requirements of the statute. But they may not, lawfully, pay shippers allowances for special or particular spotting, not included in the line-haul rates, unless the undertaking to perform such special and particular services, and the allowance to be paid therefor when the performance is by the shipper, are both expressly defined and published in their tariffs. To make allowances for such services—or any other services—without observing the requirements of section 6 of the statute, would be a form of rebating.

The intended point of significance here, however, is that, if duly published in the manner prescribed by law, the carriers are free to perform such special and particular services, or to engage the industries to do the work for them, in return for *reasonable,* not excessive, compensation; subject always to the inhibitions against unlawful discrimination, undue preference or undue prejudice, to which attention will presently be given.

An allowance which exceeds reasonable compensation to the industry, for the spotting service performed by it, generally tested by the operating costs incurred, including a fair return on the investment in property devoted to such work, may be the equivalent of a rebate. *Mitchell Coal Case, supra.* What is, or what is not, reasonable, is an administrative question for determination by the Commission. Such allowances need not be equal in amount, for, to make them so, would, in many instances, give rise to prohibited discrimination. Gen-

erally speaking, they should not exceed the cost to the carriers of performing the services.

DISCRIMINATIONS, PREFERENCES, ADVANTAGES AND CONCESSIONS:

Fifth, all discriminations, preferences and advantages are not unlawful. *Nashville C. & St. L. Ry. v. State of Tennessee,* 262 U. S. 318; 43 S. Ct. 583. To be unlawful they must be undue, unjust, and unreasonable, to the extent of violating the spirit and purpose of the regulating statute; that is, they must in measure and effect be repugnant to the legislatively declared public policy. The standards of what are and what are not undue, unjust, and unreasonable, are not precisely defined by statute, any more than are "special" and "particular" spotting services. Violating the express terms of published tariffs, in reference to rates, rules, regulations, or practices—thus *ipso facto* resulting in prohibited discrimination—is, of course, *malum prohibitum;* but, as before indicated, unlawful discriminations, preferences, and advantages, in the nature of concessions, take many forms which are not in violation of specific tariff terms, and are dependent upon the particular facts and circumstances of each case. For example, to furnish expedited services in transporting live stock was found to be an unlawful preference, sufficiently so to avoid a contract to furnish such services and to protect the carrier against damages for breach. *Chicago & A. R. Co. v. Kirby,* 225 U. S. 155, 32 S. Ct. 648. An agreement to furnish cars for loading live stock on a day certain, including of course the placement of them for loading, was declared to be an unlawful preference. *Davis v. Cornwell,* 264 U. S. 560; 44 S. Ct. 410. These matters did not depend upon express terms of the tariffs, but rather upon the nature and extent of services customarily and ordinarily rendered, and which reasonably could be de-

manded, as a common-carrier duty in conducting transportation at the lawfully established rates. The *General Electric Case, supra,* was of the same nature, where the extent to which the carrier would go in "spotting" cars was not, in terms, defined in the tariff, but depended upon the kind and extent of such services which reasonably could be demanded at the established transportation rates. Similarly, the violation of a service order, not embodied in the tariffs and wholly apart from the transportation rates, was held to be an undue preference, or "concession," constituting a public wrong and subject to the penalties of the Elkins Act. *United States v. P. Koenig Coal Co.,* 270 U. S. 512; 46 S. Ct. 392; *United States v. Michigan Portland Cement Co.,* 270 U. S. 521; 46 S. Ct. 395. There are numerous incidents of service in conducting transportation, including the "special" and "particular" spotting of cars, which have not the effect of violating specific tariff terms, but which in substance are effective in giving unlawful preferences. Authorities in great abundance are cited in the Interstate Commerce Acts, Annotated, Vol. 4, Elkins Act, (p. 2747 to 2787), which need not be repeated here. It happens also that unlawful preferences result in applying the express terms of the tariffs, where the prescribed and published rules or practices are established towards that end. *Merchants Warehouse Co. v. United States,* 283 U. S. 501; 51 S. Ct. 505. Typical of this situation is a recent case decided in July, 1932, *Loading and Unloading Freight by Cranes,* 186 I. C. C. 247. Compare a somewhat reverse situation, where the carrier attempted to assess rental charges for use of its locomotive in spotting cars, when such services, although not specified in the terms of the tariffs, were nevertheless deemed to be included in the transportation rates. *Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co. Inc.,* 270 U. S. 260; 46 S. Ct. 220.

Discriminations and preferences of the kind just described, to make them unlawful and subject to the penal provisions of the statute, need not be associated with, and are not dependent upon, the concurrent presence and effect of specific undue prejudice, as an essential concomitant. They are not subject to alternative corrective orders, in the sense of leaving the carriers to choose whether they will remedy the public wrong by extending the preference to all, or by withdrawing it altogether. Neither is it a prerequisite for the purpose of establishing that the preference is unlawful to show that commercial competition exists, as between the persons having the benefit of the preference and others engaged in like business and similarly circumstanced. The general showing of inequality resulting from favoritism in granting a concession from customary and normally prevailing practices is sufficient. *Davis v. Cornwell, supra; Merchants Warehouse Co. v. United States, supra; United States v. Pennsylvania R. Co.*, 266 U. S. 191, 199; 107 I. C. C. 119 (*York Switching Case*); *Louisville & N. R. Co. v. United States* (*Private Office-Car Case*), 282 U. S. 740; also 282 U. S. 760; *Louisville & N. R. Co. v. United States*, 238 U. S. 1; 35 S. Ct. 696 and numerous other authorities which need not be cited.

On the other hand, there are a large group of cases in which the Commission—charged with the duty of determining issues of unlawful discrimination, preference, and prejudice, as questions of ultimate fact—have found undue preferences to exist in the particulars of departures, by way of concessions, from normally prevailing, customary, and reasonable standards in matters of rates and practices, but have left the carriers free to choose between extending such preferences to all shippers similarly circumstanced, or withdrawing them from those favored. A clear example is *Jacksonville Traffic Bureau v. Seaboard Air Line Ry. Co.*, 178 I. C. C. 634,

decided October 7, 1931. More directly related to the questions here under consideration, however, are about 100 cases, extending over a period of almost two decades, where questions of unjust discrimination, undue preference and undue prejudice, in making allowances to industries for spotting cars on private industrial tracks, have been decided in the alternative, giving to the carriers the liberty of extending the preferences to all, if they chose that manner of curing the law violations. The citation of a typical case, which affected one of the industries (No. 155) included in this investigation, will suffice. *Carey Mfg. Co. v. Director General,* 59 I. C. C. 640. These cases are of major significance in relation to this inquiry, in the sense that they permit the carriers, without charge in addition to their line-haul rates, to perform, or pay for, services, not included in their established line-haul rates, of the special and particular nature described elsewhere herein. *General Electric Case, supra,* and despite the fact that, in terms, the tariffs do not provide for such services.

But there is another line of cases which has dealt with discriminations, preferences, and advantages, including apparent "concessions," which were held to be not undue, or unreasonable, and therefore not unlawful. Important and typical among these are the so-called elevation cases. *Union Pacific R. Co. v. Updike Grain Co.,* 222 U. S. 215; 32 S. Ct. 39; *Interstate Com. Com. v. Diffenbaugh,* 222 U. S. 42; 32 S. Ct. 22; *Interstate Commerce Comm. v. F. H. Peavy & Co.,* 222 U. S. 42; 32 S. Ct. 22. In the first of these cases the Supreme Court of the United States took occasion to point out, in reference to section 3 of the Interstate Commerce Act, and as bearing particularly upon the subject of undue preference, that:

> "The statute must be taken as a legislative recognition of the long continued practice, and a declaration that the *incidental advantages* derived

by the owners were not undue." (Italics for emphasis.)

This statement had reference to the "incidental advantages" inuring to the benefit of the owners of grain in the cleaning and grading of that product as it runs through the elevators in the course of transportation, and for which the carriers paid the shippers (owners) an elevation allowance presumed to include the cleaning and grading services. Similar "incidental advantages" were acquired by Arbuckle Brothers, dealers in sugar and coffee, with a place of business, including warehouses, wharves, lighters, and floats, within the lighterage limits of New York Harbor on the East River. Those facilities, or substantial parts of them, were let unto the use of a Terminal Company, created and owned by Arbuckle Brothers. The Terminal Company, known as the "Jay Street Terminal," in turn became the agent of the carriers having rail-ends on the Jersey City side, under a contract to serve those carriers, through use of the described facilities, in receiving and delivering freight at the "Jay Street Terminal," and transferring it between there and the Jersey side by lighters or floats. For that service the Terminal Company received allowances of from 3 to 4½ cents per 100 pounds, depending upon the origin or destination of the traffic, including the sugar and coffee traffic of Arbuckle Brothers, which composed about one-third of the total traffic handled through the Jay Street Terminal. The arrangement was duly covered by tariff, and its effect was indirectly to make allowances to Arbuckle Brothers on their own traffic for the services of taking it from and delivering it to the railroads on the Jersey side. Like services were denied to a competitor, the Federal Sugar Refining Company, located beyond the prescribed lighterage limits, but were indiscriminately given to all shippers of all commodities located within the lighterage limits. In

practical operation the Jay Street Terminal was in fact a public depot of the railroads, open to all shippers alike, but located upon the property of, and operated indirectly by, Arbuckle Brothers. The competing Federal Company undertook to offer and receive its traffic within the defined lighterage limits, so that it, too, could demand allowances similar to those paid indirectly to Arbuckle Brothers; and it chose for that purpose Pier 24, on which it had an office building. But that, unlike Jay Street Terminal, was not a public railroad depot. Besides, the process employed was fictitious; no real deliveries or acceptances being made of the Federal Company's traffic at Pier 24. Nevertheless, in that circumstance, the Commission found that Arbuckle Brothers were indirectly being given an undue preference, and ordered the carriers to cease and desist therefrom, or, alternatively, to make like allowances to the competing Federal Company (20 I. C. C. 200). In reversing the Commission, *United States v. Balt. & Ohio R. R. Co.*, 231 U. S. 274, the Supreme Court of the United States took occasion to observe (pp. 289, 290):

> "The order of the Commission is made to rest upon an erroneous assumption that the service performed by Arbuckle Brothers in respect of their own west-bound shipments of sugar after the delivery of such sugar at this station (Jay Street), is *a shipper's service done for their convenience*, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensation unless (alternatively) a similar compensation is allowed to the Federal Sugar Refining Company for lighterage of its sugar to the west-shore terminal railroads.
>
> That *certain advantages inured to Arbuckle Brothers* from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost, is obvious. That this was a consideration which operated as an inducement to make these contracts

(agency contract with the Arbuckle owned Terminal Co.) may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station. That they (Arbuckle's) were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers, may also be conceded. But *these were business considerations* which are far from showing *any purpose to give them any illegal preference*, or to discriminate against other shippers." (Italics for emphasis.)

The foregoing case is covered here in considerable detail because it is important among the group of cases which mark and separate "incidental advantages," that may be acquired in conducting *bona fide* common-carrier services, from "undue preferences" and follows consistently the reasoning of Justice Cardozo in the *General Electric Case, supra,* hereinbefore alluded to, who described the "test," or dividing line, as "vague"; also because it relates to terminal services quite analogous to "spotting" services, performed by shippers to whom allowances, at least indirectly, are paid as compensation for receiving and delivering property at the door of the industry. It is significant in relation to the "incidental advantages" that may inure to some industries in receiving the so-called "special" and "particular" spotting services because of their large volume of business, the lay-out and capacity of their tracks, and other considerations, as well as in relation to the "good business" policy of the carriers in rendering such services without charge in addition to their line-haul rates, to all shippers and industries that have need for them.

CUSTOM AND PRACTICE:

Sixth, in ultimate aspects the questions raised upon the record in this proceeding are neither administrative nor ministerial, but questions of law. Neverthless, the determination of them requires preliminary examination and decision of administrative questions which are not susceptible of conclusive answer from the express terms of the carriers' published tariffs. *Great Northern Ry. Co. v. Merchants' Elevator Co.,* 259 U. S. 285; 42 S. Ct. 477; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.,* 234 U. S. 138; 34 S. Ct. 885, 888, 889. The administrative question here presented inquires into the measure and kind of "spotting" service included in the line-haul rates. As before indicated, there is no precise definition, either in tariff terms or by "rule-of-thumb", which accurately and inflexibly marks the limits of "ordinary" spotting services that are deemed to be included in the line-haul rates; or which, by precise classification or measurement, defines "special" or "particular" spotting services which are deemed not to be included in such rates. This observation is identified as closely with the payment of allowances as with the performance of the services by the carriers. Perhaps the most outstanding guide-post and typical example of the distinction between the two classes is the anaylsis by Justcie Cardozo, in the *General Electric Case, supra,* reviewed by the Supreme Court of the United States on a petition for *certiorari*[3]; that petition having been de-

---

[3] In *Vogt & Sons v. C., B. & Q. R. Co.,* 181 I. C. C. 151, it is pointed out that "the denial of such a petition imports no expression of opinion upon the merits of the case." *United States v. Carver,* 260 U. S. 482. That citation was there made as justification for disregarding the opinion below of the Federal Court which was in conflict with many opinions of the commission on the same issue raised in the so-called combination rule cases. Other opinions of the commission cite the denial of the writ as if it had the authoritative weight of the Supreme Court of the United States in affirming the opinion and judgment of the lower court.

nied because no errors of fact or law were apparent in the opinion and judgment below.

The "ordinary" and customary spotting services, generally conceded to be included in the line-haul rates —spoken of and described at times in the authorities as the equivalent of, or substitute for, like spotting services on the carriers' public team tracks—are not open to question in this proceeding, and could be left out of view altogether were it not for the importance of distinguishing them from the "special" and "particular" spotting services. It is this latter class of services, apparently of special benefit and value to industries having many separate plant units, scattered over wide areas, and connected by systems of industrial tracks, to which it is understood that this inquiry is principally, if not exclusively, directed. The question is, are such services, along with "ordinary" spotting services, also included in the line-haul rates? The "ordinary" services are deemed to be included in the line-haul rates by virtue of *custom* and *practice*. Are the "special" and "particular" services included in those rates by virtue of the same rule for the same reason? The carriers, as before indicated, are at liberty to render such services without charge in addition to the line-haul rates. They may not be compelled to render them, but may do so voluntarily; and if it has been their custom and practice voluntarily to do so—whenever and to the extent called upon without discrimination as between shippers, localities, or particular descriptions of traffic, and wherever physically possible of performance—then such services are included in the line-haul rates by force of the identical

---

Although the denial of such a writ imports no expression of opinion on the merits, it nevertheless is an expression of opinion by the high court that no error of fact or law is apparent in the decision of the lower court, despite the efforts of the petitioner to prove otherwise; and it is in that sense that the denial of the petition is here cited.

and precise tests which bring the "ordinary" spotting services within those rates. In relation to both classes of service the test is the prevailing custom and practice.

Broadly stated, in relation to both official and western classification territories, but allowing for minor exceptions of insufficient importance to specify, the evidence—weighed chiefly from the testimony of experienced and practical railroad operating officials in intimate and constant touch with the operating performance—is that the carriers recognize no distinction as between the two classes of service, and never have. Where the nature and volume of the business, the layout and capacity of the private industrial tracks, and efficient and satisfactory service to the industries, require and justify, they "spot" the cars on the private industrial tracks in accessible positions for loading and unloading where, and as wanted, by the industries, and, as nearly as may be, to meet the conveniences of the industries. For the most part these services are described to be mutually advantageous, rather than burdensome; and as a whole the industries have made no complaint concerning them. Thus, when tested by prevailing *custom* and *practice,* which governs "ordinary" spotting, the conclusion must be that, excepting where in express terms the carriers' published tariffs provide otherwise[4], the so-called "special" and "particular" spotting services are also included in the line-haul rates.

In southern classification territory the policy and practice of the carriers is somewhat different. in that territory there are relatively few industries which have extensive systems of private industrial tracks. For the

---

4 Iron ore is subject to a terminal charge, in addition to the line-haul rates for spotting services, under the terms of the Commission's findings and order in the *Iron Ore Cases,* 41 I. C. C. 181.

most part these are the iron and steel industries in the vicinity of Birmingham, Ala., although there are some others. In those instances the carriers deem their common-carrier duty completely accomplished in leaving and taking cars from the designated interchange yard or tracks either just inside or outside the confines of the industrial plants. In other words, they do not customarily render "special" and "particular" spotting services, and therefore such services, in that territory, are deemed not to be included in the line-haul rates either by virtue of custom and practice, tariff terms, or any other rule. An outstanding exception to this general policy, attends the transportation of lumber and lumber products from the so-called "yellow pine blanket" of the south and south-west, attributable to the findings of the Commission and the Supreme Court of the United States in the *Tap Line Cases,* 234 U. S. 1. The lumber rates maintained by the carriers generally apply from the lumber mills, often located some distance from the trunk-line tracks on "tap-lines" owned by the industries and operated as common carriers, or on private industrial tracks owned by the mills. The rates include the services of bringing the lumber from the mills to the junctions with trunk-line tracks; and, of course, include also the "spotting" services at the mills.

These observations as to the general policies and practices of the carriers in the respective classification territories, purposely omitting insignificant departures in particular situations, lead to an examination of the facts and circumstances which gave rise to the representations and suggestions that the performance of the described services are attended by what seemingly are unlawful inequalities, discriminations, preferences, and perhaps unduly burdensome against the railway operating expenses and revenues. Having described generally

the prevailing *custom* and *practice* attention will now be given to these other subjects.

REPRESENTED INEQUALITIES, DISCRIMINATIONS, PREFERENCES, ETC.

Seventh, in approaching these subjects it is not the intention to make specific findings of fact, relating separately to the many individual industries within the scope of this inquiry; nor is it the purpose to analyze the few scattered instances of what may appear, in at least a *prima facie* sense, to be violations of the law in one particular or another. Only those facts and circumstances which establish differences in treatment, and fall within the general practices and policies of the carriers, as related generally to all industries, will be given attention. These divide themselves naturally into two groups; for convenience, designated as groups A and B and described as follows:

Group A: Relating to the obstacles of interference which obstruct and prevent freedom of access to and operation on the private industrial tracks by the carriers' locomotives, for the purposes of performing the spotting services, as more particularly described at pages 6, 7 of this memorandum.

Group B: Relating to the allowances made by the carriers to the industries, where the spotting services are performed by the industries with their own power; including the different bases, restrictions and limitations, applied in making such allowances; also the circumstances under which they are denied.

First, as to Group A: The evidence establishes many instances where, for preferential reasons of their own, the industries, with their own power, perform their own spotting services. They neither ask nor receive compensation from the carriers for their work, assuming the cost thereof as an incident to their industrial operations. In these instances the carriers leave and

take the cars at or near the industrial plant gates on designated interchange tracks, going as far as desired and permitted by the industries. Obviously there is nothing wrong with this practice, and it may be eliminated from further attention.

The evidence further establishes that there are a great many instances where—due to lack of adequate maintenance, excessive curvatures, light weight of rail, numerous cross-overs, turn-outs, switches, or other obstacles—the physical conditions of the private industrial tracks are such that they either will not accommodate the carriers' power or cannot be used by that power without hazard or excessive delay. There is discrimination by the carriers in dealing with such situations, doubtless justified in some instances, but not in others. Of course, due to the described physical disabilities, the carriers do not undertake to perform the spotting services. The industries, with their own power, do the work, but the discrimination lies in the fact that in the case of some industries so circumstanced, the carriers refuse allowances upon the ground of being unable, as a physical matter, to perform the spotting services to which these industries would otherwise be entitled, while in the case of other industries, having tracks unfit to accommodate the carriers' power, compensation is granted by the carriers to these industries for performing their own spotting services. In some such situations, there seems to be no valid ground for this difference in treatment, while in other instances, justifying reasons are apparent.[5] For example, there are instances where the defects in the industrial tracks are susceptible of elimi-

---

[5] Typical are Marion Steam Shovel Co., Marion, O., (Industry No. 124), compared with the Osgood Company (Industry No. 670), both served by the C. & O., and the tracks at both plants being defective. Both industries are engaged in like business; one being paid an allowance and the other not. (Record P. 6065 to 6096; and 6626 to 6634.)

nation by applying a higher standard of maintenance, substituting heavier for lighter rail, straightening, out curves, and the like; and where if such defects were removed, the industries clearly would be entitled to have their spotting services performed by the carriers at the line-haul rates. Studies in many such instances have developed that even if the industries went to the additional expense of removing the physical defects, it would still be less costly, and therefore more economical to the carriers, to make allowances to the industries for performing their own spotting services than for the carriers to undertake to do it with their own power. The factors of economy, both to the industries and the railroads under such circumstances, are the lighter power used by the industries, the use of fewer men in operating their industrial engines, the lower wage-scales paid their locomotive crews, the excess operating expenses incurred by the railroads in operating switch engines between remote base yards and the industries, etc. In the light of such known results, the granting of allowances is justified by ordinary business prudence and economy. There are other instances where the defects in the private industrial tracks are of a nature that could not be eliminated without the remodeling or rebuilding of the entire industrial plant, such as sharp clearances close to plan buildings. Discriminations of the kind here described are not established as being either wide-spread or of important effect and consequences. No one was heard to complain about them. The slight advantages and disadvantages which may arise as between industries from the described differences in treatment actually spring from considerations attending the physical situation existing at each industry for which the industry, not the carriers, should assume full responsibility. Individual instances of undue preference or undue prejudice might result from such discrimination; but the

practice, as such, supported by the reasons here shown, is not in and of itself unlawful or otherwise open to censure.

Another form of interference within Group A, of which some notice was taken, are the circumstances where many of the larger industries, having extensive systems of private industrial tracks, are served by two or more carriers, and, in their industrial processes, operate their own locomotives on such tracks in performing intra-plant industrial movements. Under such circumstances, it is frequently impossible, as a practical matter, for the engines of each carrier to enter upon the private industrial tracks for the purposes of spotting cars without encountering some degree of interference by the power of other carriers occupying the private industrial tracks for the same purposes at the same time, or by the power of the industries engaged, concurrently, in the performance of intra-plant services. In overcoming that situation, arrangements are often made, as between the carriers, for the joint performance of the spotting services by a single carrier, for itself and all the others, prorating the operating costs between them upon basis of the cars handled for each. In some cases the joint engine also performs the industrial intra-plant movements, at the established tariff rates for that service; thus reducing the operation on the private industrial tracks, for all purposes, to the most efficient and economical basis. That practice, of course, is to be commended. In some cases the entire work, including spotting for the carriers and intra-plant service for the industries, is performed by the industry with its power. When that is done the carriers make allowances to the industries as compensation to them for the "spotting" services. Generally, these allowances are sufficient to cover only the cost, and more often are less than the cost, to the industry of performing the "ordinary" spot-

ting services included in the line-haul rates; and as a rule are substantially less than it would cost the carriers to render like services with their own power. This, too, is a commendable practice, mutually beneficial, from the standpoint of efficiency and economy. The question arising in connection with it is whether the carriers should either perform, or pay for, such services because each of them, as a practical operating matter, do not have freedom of access to and from the spotting locations at their own convenience and on their own schedules without encountering the described interferences and interruptions; the point being that, under such circumstances, the services beyond the gate of the plant, on the industrial tracks, exceeds, at least in cost, the "ordinary" spotting services within the line-haul rates. But, as previously explained, the carriers are at liberty to render such services without charge in addition to their line-haul rates, and are doing so as a matter of prevailing and long continued custom and practice. Even if they discontinued such services, and refused to pay for them out of their rates under the circumstances stated, the industries could easily meet the situation by patronizing only one of the several carriers having track connections with the industry thus forcing the others, if they desired any of the traffic, to absorb the switching charges of the patronized carrier. In that manner the carrier chosen by the industry for patronage would be required to perform only "ordinary" spotting services included in the line-haul rates, and could accomplish that work without any of the described interferences or interruptions. The carriers' practice seems not to have any unlawful effect, especially in view of the fact that the allowances, where made, are based on the costs of "ordinary" switching, only.

Next, concerning another form of interference closely associated with the instances where the industries

prefer to perform their own spotting services with their own power, but neither ask nor receive allowances from the carriers: There are of record a number of cases where, although the carriers stand ready, able, and willing, to perform the services, the industries apparently refuse to let them do it, and will not permit the carriers' locomotives to enter on the private industrial tracks for that purpose. Those industries are neverthless paid allowances by the carriers. These instances are where all of the carriers serving the industries do not have direct physical track connections with the private industrial tracks, and are under the disability of being required to engage, as a switching carrier, one of the lines which has direct physical track connection with the private industrial tracks. In such circumstances it is not the switching carrier which makes the allowance, but the carrier that engages the switching carrier; the allowance being granted to the industry in addition to absorbing the switching carrier's reciprocal switching charge. Where the switching charge includes the spotting services on the private industrial tracks, and the switching carrier stands ready to perform such services, but is refused permission by the industries, there is no justification for the payment of allowances to the industries by the line-haul carriers. In most of these cases, however, it appears that the allowances paid to the industries are substantially less than it would cost either the switching-carrier or the line-haul carriers to do the work; and this is generally true where the industries are willing to have the spotting services performed by the carriers. The fact that the line-haul carriers, rather than the switching-carrier, make the allowance, in addition to absorbing the switching carrier's charge, is not of special importance, since, if the switching carrier paid the allowances it would mean only that its reciprocal switching charge would be corresponding-

ly increased. There is nothing unlawful in this situation excepting where it is conclusively shown that the industries refuse to permit the carriers to perform the services in instances where the cost of performance by the carriers is less than the amount of the allowances paid to the industries. There are no such cases conclusively established by the evidence. The question is, where the carriers do not reach the industries by direct physical track connection—that disability having the same effect as where the private industrial tracks, although connected, are physically unfit—why should any allowance be made, and why should the carriers under such circumstances bear the expense of the spotting services? The answer is that the circumstances are not different, in practical effect, from the long continued custom and practice of the carriers in absorbing each others' switching charges for the purposes of reaching and serving industries off their own rails. Allowances of the nature just described are spoken of on the record as "over-head allowances," and have been induced largely by railroad competition. Some of them require closer analysis and examination, but that need not be done here.

Apart from the so-called interferences already specified—but in some particulars also within them—are those which the carriers themselves have earmarked and described in their formula, before mentioned, which is used as a basis for measuring the unit allowance, per car or per ton, to be paid the industries for performing "ordinary" spotting services. The engine-hour costs attributable to such interferences are excluded from the allowances and charged against the industrial plant operation; the effect of which is to pay the industries, which perform such services, for nothing in excess of the "ordinary" spotting. The discrimination, or difference in treatment, to be observed here is that where the carriers perform spotting services with their own

power, incurring the operating expenses incident thereto, the industries get the full benefit and value of such services—whether "ordinary" or "special" and "'particular"—without charge being made against them for the so-called interferences. That is to say, in practical operating performance by the carriers, no notice is taken of the described interferences or interruptions, which concededly are present in a greater or less degree at most of the industrial plants having extensive systems of private industrial tracks. Such interferences are said not to be constant and continuing from day to day, but for the most part are transitory, being present today and gone tomorrow, according to what is taking place in the industrial operations from time to time. Nevertheless, where the industries do the work, and are paid allowances therefor, the time cost of such interferences measured by what was encountered in a selected test period, are treated as if they were constant and continuing, by eliminating them from the amount of the allowance, per car or per ton, thereafter to be paid the industries whether the interferences are or are not actually encountered in the physical spotting performance. In this way the carriers procure spotting services, which otherwise they would themselves perform under the prevailing custom and practice, at a cost to them much less than would be, and generally is, incurred by them in their own operating performance. The kind of interferences and interruptions mentioned, and charged against the industries under the stated circumstances, are described in part as follows, viz:

	Description	*Chargeable to*
1	"Time for service in excess of normal operation"	Plant
2	"Time of interference and interruption by plant operations" ..	Plant

	Description	*Chargeable to*
3	"Time in switching and handling cars when held for advice from the plant as to disposition, or ordered returned for inspection, etc."	Plant
4	"Weighing for account of plant"	Plant
5	"Delay, interruption or interference by (plant) locomotive crane"	Plant
6	"Delays caused by locomotives engaged in work solely for the plant"	Plant
7	"Delay by maintenance or construction work (on plant tracks)"	Plant
8	"Waiting for locomotive at beginning of shift"	Plant, partially
9	"Taking fuel, water, sand and other supplies"	Reasonable time to overhead; remainder to Plant
11	"Waiting for orders"	Plant
12	"Cleaning fires"	Reasonable time to overhead; balance to Plant
13	"Minor adjustment or repair to locomotive during working hours"	Do
14	"Change of locomotives"	Do
15	"Lunch period"	Do
22	"Time during working hours when no work is assigned, and crew is waiting for assignments"	Plant

The foregoing are typical. In addition to them the formula provides for the assignment of other time to the plants. Important among the latter is the following:

> "13—Inbound cars held for disposition orders from the plant should be recorded as railroad cars up to the point where held; when moved from point where held to unloading point should be recorded as plant cars."
>
> "11—Loaded or empty inbound or outbound cars moved between the railroad interchange track and point of first placement for loading or unloading shall be recorded as railroad cars."

These last two rules, identified as numbers 13 and 11, as presently will be seen, are of significance when compared with the spotting services rendered by the carriers with their own power under circumstances where, of course, the industries, not performing the work, do not receive allowances. For example, in reference to the larger industries—where the number of inbound and outbound cars handled daily run into the hundreds, and where the carriers' locomotives ranging from more than one to twenty-five, and even more, are constantly engaged day and night in shifting and spotting cars for the plant, some in interchange service and others in intraplant service—the operating practice in physical performance is to trip to and fro between the interchange tracks and the locations of loading and unloading in placing the cars, as to commodities, quantities, and sometimes the grades, at the particular locations and at times desired by the industries. In other words, within the meaning of the rules herein identified as numbers 3 and 13, there is what appears to be a temporary setting-out and "holding" upon the interchange track connection or whatever system of set-out tracks may be assigned for that purpose, and a distribution from there to the locations of loading and unloading as desired by

the industry. No charge in addition to the line-haul rates is made for that service, and apparently it is furnished wherever needed by the industry and justified by the volume of traffic. Examples of such performance are those at the Chevrolet automobile plant at Detroit, the plant of the Illinois Steel Corporation at Gary, Ind., and the Homestead works of the Carnegie Steel Company at Pittsburgh, Pa. There are a number of others, to which special reference need not be made. The point for observation and emphasis, defining the differences in treatment, is that where such services are performed by the carriers with their own power, the entire cost is born by them in their operating expenses with no assistance or contribution from the industries in the way of a charge or otherwise; but, where the services are performed by the industries with their own power, the compensation they receive from the carriers for doing that work excludes the cost of all engine-hour time consumed in the process described in the foregoing rules. According to the formula, and the testimony concerning its application, the allowances cover only the cost of what has here been spoken of as "ordinary" spotting; all services in excess thereof, classified and measured under the terms of the formula, being borne by the industries. The discrimination is obvious, but—is it unlawful? The answer to that question is no; and the reasons for the answer are at least two. First, in hiring the industries to perform spotting services for them, or any other services for that matter, the carriers are free to bargain for the best available price and they do so, subject of course, to the statutory restriction that such allowances must not exceed a reasonable amount. Therefore, the lower the hiring charge, the greater the economy to the carriers. That is good business. The industries are not compelled to accept or agree to the compensation offered. They can insist upon the serv-

ices instead; that is, the same services which, under the prevailing custom and practice, are given to other industries similarly circumstanced. Second, where the industries do accept and agree to the offered compensation, excluded from which are the cost items chargeable against the plant under the adopted formula, it is because of the recognized benefits and advantages apart from the allowances which they derive from performing the services with their own power on a time schedule and orderly arrangement which more efficiently and effectively responds to the particular needs of the industry in its industrial functioning. For example, quite often the volume of traffic at a particular industry is not such as would require the constant presence of carrier power at the plant for spotting work, and the industrial work at the plant would have to be arranged so that the spotting services by the carrier could be accomplished in two or three switches a day on a schedule as convenient as possible to both the carrier and the industry. Under such circumstances, the industrial processes at times would suffer inconvenience and delay through inability to spot cars at times other than when the carrier power was present under the arranged schedule. On the other hand, when the industry has its own power and receives an allowance calculated on basis of the adopted formula, it is free to make use of that power in spotting cars in such quantities and at such times as may be desired to meet the special needs of the plant operation, which might mean a factor of considerable economy in manufacturing costs. In this observation it should be remembered that, in nearly all cases of record where allowances are granted, the amount of those allowances are less than the operating costs which would be incurred by the carriers if they, with their own power, performed the services. Thus, even where the industries accept allowances on basis of the described

formula—generally less than the operating costs to them of performing the services—the agreement as between them and the carrier is one of economical benefits to both. This is viewing the situation generally, not specially, and leaves out of consideration any specific situations where the practice apparently gives effect to discriminations which, in turn, seemingly result in undue preference and undue prejudice. This question, like most others related to the car-spotting services, is local in nature and must be examined in the light of the particular circumstances and conditions existing at each separate industry. It should be added that, as related to the total number of industries within this inquiry, there are comparatively few where the carriers find occasion to assign one or more locomotives for the exclusive services of spotting cars at particular industries, and that where such assignments are made—chiefly to the iron and steel industries, but also including some others among which are a few of the automobile industries—they are unquestionably justified by the daily volume of traffic. Broadly stated, there is nothing unlawful associated with or effected by these described practices.

Coming now to Group B, which relates to the represented inequalities, discriminations, or differences in treatment, as between industries arising from the different bases used in determining the amounts o the allowances; the restrictions and limitations imposed by the carriers in granting such allowances; and the circumstances under which they are denied. First, as to the different bases: As elsewhere stated herein, of the carriers operating in official classification territory, those in eastern trunk-line territory and some in central freight association territory, base the amount of the allowances to iron and steel industries on the costs of material and labor which prevailed in the years 1915-1916; whereas many of the central freight association

lines, especially those serving the iron and steel industries in the Chicago district—which also include some of the carriers whose lines extend from that territory into eastern trunk-line territory—base the allowances on current costs. That is, the costs current at the particular time the cost-study tests were made. In some instances the allowances, to both iron and steel industries and to industries engaged in other lines of business, are limited to specified maximum amounts, while others, not likewise limited, are based on the actual costs current at the time the services are rendered, and vary from month to month according to the volume of traffic, price changes, etc. In these aspects, the measurement and bases by which the allowances are gauged, are neither uniform nor inflexible. Generally they are, and doubtless should be, upon basis of the best bargain the carriers can make within the law. This question has previously been examined herein and requires no further consideration other than perhaps to repeat that the described differences in treatment apparently are without unlawful effect, although it is possible that unlawful preference or prejudice might result in some particular instances. These of course would require special attention not here intended.

Second, as to the policy of the eastern trunk lines in undertaking to restrict the payment of allowances to iron and steel industries: According to the evidence of the carriers' own operating officials, this policy is clearly unjustified. The test is not, and should not be, the kind of business in which a particular industry is engaged, but rather, whether it is more economical to the carrier to hire the industry to perform the spotting services than to themselves perform it with their own power and crews. Apparently the operating officers have had little or no voice in determining such questions although primarily and ultimately they are, in their very essence,

operating considerations. Again, this particular policy or undertaking is not rigidly observed. The carriers which have adopted it frequently yield to industries other than those engaged in the iron and steel business, but only upon authority of their traffic executives. There are described of record instances where allowances have been declined to industries on the sole ground that they were not engaged in the iron and steel business. Whether the effect of such denials was to violate section 3 is another question, not susceptible of determination from the facts of record.

Third, in relation to the refusal to grant allowances on other grounds: Most of such refusals were based upon the alleged inability of the carriers, with their own power, to enter upon the private industrial tracks for the purposes of performing spotting services to which the affected industries would otherwise be entitled under the prevailing custom and practice. These too have been described elsewhere herein and do not require further consideration excepting to observe that inequality and discrimination, in some instances apparently to an unlawful degree, have resulted from denying allowances to some industries for the stated reasons, and granting them to others where like defects existed in the private industrial tracks.

IN CONCLUSION:

The evidence, as a whole, indicates that there is little if anything wrong with the present practices of the carriers in rendering these spotting services, or in paying industries reasonable compensation for performing them. Certainly they have not been proven burdensome against the railway operating revenues or operating expenses; and, allowing for the comparatively few questionable instances, these described practices have not been found generally unlawful. In some par-

ticulars they leave at hand ready means for practicing discriminations which might reach unlawful proportions and effect, but such opportunities are open in reference to practically all incidents of conducting transportation. The evidence will not support any recommendation to lessen the extent of the spotting services now being rendered by the carriers, or to impose any charge therefor in addition to the line-haul rates. The economy gained by the carriers through engaging the industries to perform the spotting services, the volume of traffic gained and retained against competition with motor trucks through rendering a store-door delivery, and the efficient rendering of services, responsive to the needs of the industries, are the ultimate facts of importance and weight established by the evidence.

In fact, what in prior years might justly have been classified "special" and "particular" spotting services—then possibly more or less burdensome and costly to the carriers—have in many cases disappeared and become no longer necessary because of the more modern methods adopted in the industrial operations at the larger plants; particularly at the iron and steel industries.

Only three suggestions for improvement present themselves. *First*, to give to the operating officials authority to determine where economy can be effected to both the carriers and the industries by engaging the industries, where practical and less costly, to perform the spotting services. *Second*, to abandon the policy of attempting to restrict such allowances to the iron and steel industries. *Third*, to require that, in express terms, the carriers' tariffs specify the instances where their line-haul rates do not include the complete spotting services.

Respectfully submitted,

HAGGERTY AND GWYNN.

EXHIBIT 3.

The views of the Interstate Commerce Commission after a thorough investigation of the subject in 1915, as reported in *Car Spotting Charges,* 34 I. C. C. 609.

INVESTIGATION AND SUSPENSION DOCKET NO. 435.
CAR SPOTTING CHARGES.

Submitted April 23, 1915. Decided July 6, 1915.

---

1. Tariffs proposing a "spotting charge" for placing cars for loading or unloading at convenient points on the tracks of industries specifically named in the tariffs found not to be justified for the reason that the proposed charge would apply in many cases to services covered by the line-haul rate, and also for the further reason that to impose the additional charge upon the industries named in the proposed tariffs and not upon other industries for which like services are performed would result in unjust discrimination.
2. The line-haul rate covers the customary movement of cars over industry tracks incident to the receipt and delivery of carload freight at convenient points on those tracks for loading or unloading without regard to the size or complexity of the industry, and the points at which the cars are to be placed by the carrier for that purpose without additional charge are to be determined by general usage.
3. The line-haul rate covers only one placement of a car upon an industry track for loading or unloading, and an additional charge should be made for each additional placement of a car for that purpose, as also for the movement of cars from place to place within the plant during the processes of manufacture.

REPORT OF THE COMMISSION.

MEYER, *Commissioner*:

This proceeding involves the propriety and reasonableness of a proposed charge for placing cars upon industry spurs or private sidings, or upon the tracks of industrial plants, at convenient points for loading and unloading, and for the movement incident thereto over the track or tracks of the industry. This charge, which is called a spotting charge, is proposed by the principal railroads in central freight association and trunk line territories and the New York, New Haven & Hartford Railroad in New England, by their individual tariffs filed with the Commission to become effective at different dates from April 20, 1914, to July 15, 1914, inclusive. The effective dates of the tariffs which were filed to become effiective prior to July 1, 1914, were postponed to that date by the voluntary act of the carriers, and upon protests from many classes of shippers all the tariffs were subsequently suspended by the Commission. The respondents announce in the suspended tariffs that they were filed to comply with a suggestion of the Commission in the *Industrial Railways case*, 29 I. C. C., 212. The proposed spotting charge is 5½ cents per ton, minimum $2 per car, and the service for which the charge is proposed is defined in the suspended tariffs as follows:

"Spotting" service is the service beyond a reasonably convenient point of interchange between road haul or connecting carriers and industrial plant tracks, and includes:

(*a*) One placement of a loaded car which the road haul or connecting carrier has transported, or

(*b*) The taking out of a loaded car from a particular location in the plant for transportation by road haul or connecting carrier.

(*c*) The handling of the empty car in the reverse direction.

The industries to which the charge applies are divided into three lists. The first of these lists appears in the tariff of the Pennsylvania Railroad Company, which may be taken as typical, under the heading:

List of industries having "industrial plant tracks" connected with the tracks of these companies on which these companies performed spotting service in the past and on which they will, if desired, continue to perform such service on and after the effective date of this tariff at the charge provided herein.

The second list appears in the same tariff under the heading:

List of industries having "industrial plant tracks" connected with the tracks of these companies on which the industry has performed spotting service in the past. The charge of these companies for performing spotting service for the industry on its plant tracks connecting directly with the tracks of these companies will be as per this tariff, provided the performance of this service by these companies is shown to be practicable and is agreed upon.

The third list appears under the following heading:

List of industrial railways (incorporated). These companies will perform "spotting" service on or over the tracks of these railways only by special agreement.

Some of the suspended tariffs do not contain the third list.

The basis of selection of industries, if there may be said to have been any such basis, varied with the different respondents. The necessity for an intraplant service in addition to the movement of cars incident to the receipt and delivery of carload freight seems to have been controlling in some cases, but in general the industries were arbitrarily selected, and range from the ordinary mill or factory with a single spur or private siding to the large iron and steel industries having an interior system of rails called a plant railway.

Considerable testimony was presented by both respondents and protestants with reference to the physical layout of the tracks over which the service is performed, the character and extent of that service, and the approximate cost thereof.

It does not appear that the terminal facilities of the respondents, exclusive of industry spurs, private sidings, and tracks of industrial plants, are now adequate for the receipt and delivery of all carload freight which they have been accustomed to receive and deliver upon such tracks at convenient points for loading and unloading, and respondents do not show that they could provide such terminal facilities, but some of the protestants testified that if such terminal facilities were provided by the carriers they would not use them.

It is admitted by the principal respondents that the proposed charge and also the lists of industries named in the tariffs are tentative merely, and that if the tariffs should take effect as filed unjust discrimination would result in that there are many industries not named in the suspended tariffs for which the respondents perform without an additional charge therefor the same service for which they propose to require the industries named in the suspended tariffs to pay the spotting charge in question. But while these respondents concede that the proposed tariffs can not be justified, they ask us to indicate how far they may go in imposing spotting charges.

One of the respondents, the Chesapeake & Ohio Railway Company of Indiana, insists that its proposed charge is justified by the mere fact that the industries upon which it proposes to impose the charge are located upon a private track which it does not own or control, and which is not a part of its terminal facilities. This respondent concedes that the line-haul rate covers the

transportation to and from the point of connection of its tracks with the track on which the industries are located and which it claims to be a private track, but it insists that it has no right to perform any service over a private track without making a charge therefor in addition to the line-haul rate, and that it not only may but must add to the line-haul rate a reasonable charge for the switching of cars between the industries in question and point of connection of its tracks with the track on which the industries are located.

The protestants insist not only that the proposed tariffs can not be justified, but that the line-haul rates cover the placement of cars upon industry tracks at convenient points for loading and unloading without regard to the size of the plant or the ownership or control of the tracks over which the cars are moved, and that no charge for the spotting service in addition to the line-haul rate could be justified.

It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line-haul rate, and in the *Los Angeles case*, 18 I. C. C., 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. *Los Angeles case* 234 U. S., 294. The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads

may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries. At the large industries the trunk line may render interplant services in the movement of cars from place to place within the plant during the processes of manufacture which it has no occasion to render at smaller industries, and for such services an additional charge should be made; but where the service rendered is merely a substitute for the service which would be required if the movement were to or from a team track, an industry spur, or a private siding, nothing should be added to the charge for the line haul.

As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary.

While we have from time to time called the attention of the carriers to the possibility of increased revenues from certain sources, and have suggested that it might be that the carriers ought to make a charge in addition to the line-haul rate for some services in connection with the movement of cars within industrial plants, for which no such additional charge is now made, we have never intended to suggest that an additional charge would be proper for services which by long continued general custom and usage have been treated as covered by the line-haul rate.

In *General Electric Co. v. N. Y. C. & H. R. R. R. Co.*, 14 I. C. C., 237, we stated that common carriers could not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, but the case did not require a decision of that question. The point actually decided was that the complainant was not entitled to an allowance from the carrier for a service which the carrier was ready and willing to perform, and which the complainant performed because it was not convenient for it to permit the carrier to perform the service. In that case the Commission said (p. 244):

The complainant is not entitled to compensation as demanded by it in the complaint or on any other ground developed upon the record. It assumed charge of the work of switching cars between its storage tracks and various points within the inclosure of its plant, not because the defendants refused longer to spot cars for it or because they did not give the complainant a reasonably good service in that respect, but simply because the growth of its business to vast proportions, the multiplication of its buildings, and the extension of its switching arrangements within the inclosure required the complainant to take charge of the interior switching for itself and to exclude the defendants from its plant. And it now demands compensation for doing that which it claims the defendants are under the obligation to do, but which it does not and could not permit them to do. On that ground alone the complaint is without merit. Relief against a defendant must ordinarily be predicated upon his failure or refusal to do what he is legally bound to do and not upon the fact that the complainant has volunteered to do it for him.

As said by the Supreme Court in *Atchison Railway Co. v. United States*, 232 U. S., 199, 214, whatever transportation service or facility the law requires the carriers to supply they have the right to furnish, and it does not follow, therefore, that because the line-haul rate

covers the movement of cars incident to the receipt and delivery of carload freight on industry spurs, or on the interior tracks of industrial plants that the owner of the property transported may in every case receive an allowance from the carrier when he performs that service.

In *Industrial Railways case,* 29 I. C. C., 212, the Commission also expressed the opinion that the line-haul rate does not cover the movement of cars incident to the receipt and delivery of carload freight at large industrial plants where the movement is through a network of interior tracks, but in that case also the question presented was one of allowances, and we did not undertake to determine the number of tracks over which the cars must move prior to their receipt or delivery by the carrier in order to deprive the owner of the property transported of the right to an allowance for the service. We did, however, in that case recognize the fact that the line-haul rate may cover the service of spotting a car at the factory door on a private siding, as we there said (pp. 225-226):

Under the common law as construed in the practically unanimous decisions of the courts, a delivery of carload freight to a shipper having a private siding is made by shunting the car upon the switch, clear of the main tracks. All services upon the siding beyond that point, in placing the car for loading or unloading at a particular spot convenient to the shipper, are what may be called volunteered services in the sense that they are in addition to the main-line haul and in excess of any obligation of service by the carrier at common law. Nevertheless, the custom of making deliveries at the warehouse or factory door on private sidings is one of long standing in this country, and under certain language in the act it is possible that the carriers may be required, upon reasonable compensation, to do this spotting, as it is called. We find no authority, however, English or American, that holds or intimates that the line carrier, in connection with the main-line haul, is under any

obligation to spot a car at the factory door on a private siding except upon reasonable compensation included in the rate itself or set up in the form of a special charge.

There may be cases in which the spots at which cars are placed for loading and unloading in complex industries are so located that the request for the receipt and delivery of carload freight at such spots could not, in view of general usage, be regarded as reasonable, and where a charge for the spotting service in addition to the line-haul rate might therefore be justified, but the mere fact that an industry is complex, or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for the receipt or delivery of carload freight. The line-haul rate, however, covers only one placement of the car for loading or unloading, and an additional charge should be made for each additional placement of the car for that purpose.

The mere fact that many individual plants are operated together as a single industry does not deprive the industry of the right to such a service in the receipt and delivery of carload freight at each of the several plants as that plant would be entitled to have if it were operated separately, unless the collective operation so far removes the necessity for such a service as to make it unreasonable for the industry to demand the service.

To permit the carriers to add to the line-haul rate a charge for the movement of cars incident to the receipt and delivery of carload freight at industries selected because of their size or complexity, or upon some other basis equally uncertain, while treating a like service at all other industries as covered by the line-haul rate, would result in unjust discrimination of a flagrant character.

The argument that while the line-haul rate may cover the movement incident to the receipt and delivery of carload freight when that movement is over an ordinary industry spur it does not cover a like service when the movement is over the interior tracks of an industrial plant is founded upon the assumption that the carrier and the industry have the joint use of the industry spur while the interior tracks of the industrial plant are used exclusively by the industry. The fact is, however, that the service which the carrier renders in the movement of cars over the interior tracks of the industrial plant for the purpose of receiving and delivering carload freight of the industry is a public service, and the tracks are used both for that public service and for the private purposes of the industry. It is immaterial that the carrier may not use the tracks for all the purposes for which it uses the ordinary industry spur. The difference is merely one of degree and not of kind.

Especially ought the tracks of the industrial plant to the extent that they are used by the carrier for a public service be treated as a part of its terminal facilities where the carrier does not show that it would be possible for it to provide the necessary terminal facilities in any other way.

The public interest is served in many ways by permitting the carriers to use the tracks of industrial plants as a part of their terminal facilities. The exclusively owned terminals of the carriers are thereby relieved of a heavy burden under which they would either break down completely or be so congested as to greatly inconvenience shippers who are compelled to receive and deliver their freight in those terminals. The distribution of terminals also tends to prevent the undue concentration of industries and consequent concentration of population, thus aiding the solution of one of our social problems.

The proposed spotting charge of the Chesapeake & Ohio Railway Company of Indiana, requires separate consideration. The industries to which it is proposed to apply this charge are located on the tracks of the Muncie & Western Railroad at Muncie, Ind. In *In re Muncie & Western R. R. Co.*, 30 I. C. C., 434, we held this road to be a mere plant facility of the principal industry located thereon, and not entitled to a division of joint rates with the trunk lines. That case is now pending on a petition for rehearing by which we are asked to reconsider that finding.

There are only two industries on the Muncie & Western, and these industries are served by two belt lines in addition to the Muncie & Western. The principal one of these two industries has a large plant, and the three lines referred to serve different parts of the plant. When the movement is over either of the two belt lines the Chesapeake & Ohio of Indiana absorbs the switching charge of that line and gives the shipper the Muncie rate, but it now proposes to add to that rate a minimum charge of $2 per car when the shipment moves over the Muncie & Western. If the Muncie & Western is a mere plant facility, the line-haul rate of the Chesapeake & Ohio of Indiana to and from Muncie covers the movement of cars incident to the receipt and delivery of freight on that track. If that road is a common carrier, the addition to the line-haul rate of a charge for the switching of cars over that road to and from industries located thereon would create an unjust discrimination so long as the trunk line absorbs the switching charges of other roads which serve the same industries, as it now does, the service in each case being substantially the same. The only reason which the Chesapeake & Ohio of Indiana gives for imposing the proposed charge for the switching of cars over the Muncie &

Western Railroad to and from the industries thereon, while it absorbs the switching charges of other roads which serve the same industries, is that such other roads are common carriers, while the Muncie & Western Railroad, as the Chesapeake & Ohio of Indiana claims, is only a plant facility. It is unnecessary, therefore, in this proceeding to determine whether the Muncie & Western is or is not a common carrier, as in either case the proposed spotting charge has not been justified.

With the growth of terminal areas and the consequent increase of terminal expenses, there may be a growing need for a separation of the charges for line-hauls from the charges for terminal services, and a graduation of charges for terminal services so that each industry within the terminal area will pay in proportion to the service it receives in addition to the line-haul, if such a system should in the future be deemed to be preferable to what now obtains; but before that could be done there would have to be a separation of the cost of the line-haul from the cost of the terminal service, and a complete reconstruction of rates.

We conclude, therefore, and find that the respondents have not justified the suspended tariffs, and an order will be entered requiring those tariffs to be canceled. The respondents may, however, file new tariffs providing for spotting charges in those instances in which the terminal services performed exceed the services which under established custom is, or should be, performed for the line-haul rate, in accordance with the views expressed in this report.

COMMISSIONER HARLAN dissents from the conclusions of the Commission in this proceeding and will later file a separate report.

EXHIBIT 4.

Views of the Public Service Commission of the Commonwealth of Pennsylvania on the subject of spotting, as set forth in opinion filed February 18, 1919 in the cases of National Tube Company et al. v. The Baltimore and Ohio Railroad Company et al., which follows:

THE PUBLIC SERVICE COMMISSION

OF THE

COMMONWEALTH OF PENNSYLVANIA.

Complaint Docket No. 193-3.

NATIONAL TUBE COMPANY

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY, PITTSBURGH & LAKE ERIE RAILROAD COMPANY.

Complaint Docket No. 193-4.

CARNEGIE STEEL COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY, PITTSBURGH & LAKE ERIE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA COMPANY, PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, ERIE RAILROAD COMPANY.

Complaint Docket No. 193-5.

AMERICAN STEEL & WIRE COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA COMPANY, PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

INTERVENORS ST. CLAIR TERMINAL RAILROAD, ETNA & MONTROSE RAILROAD, PITTSBURGH & OHIO VALLEY RAILROAD, MERCER VALLEY RAILROAD, MCKEESPORT CONNECTING RAILROAD, NORTHERN LIBERTIES RAILWAY COMPANY, DONORA SOUTHERN RAILROAD COMPANY.

REPORT OF THE COMMISSION.

AINEY, *Chairman*:

There are three complaints now before us, all relating to the withdrawal, by respondents, of rate allowances to industrial railways for deliveries to their proprietary industries, which, because of the similarity of conditions presented, were heard together and may be disposed of in this report.

The National Tube Company, complainant in No. 193-3, is engaged in the manufacture of wrought iron pipe, with four plants located in McKeesport, on the McKeesport Connecting Railroad, and two plants located in Pittsburgh, on the Monongahela Connecting Railroad. Its complaint is directed against the Baltimore and Ohio Railroad Company, the Pennsylvania Railroad Company and the Pittsburgh and Lake Erie Railroad Company.

The Carnegie Steel Company, complainant in No. 193-4, is engaged in the manufacture of steel products, with plants located at Munhall, Homestead, Rankin, South Duquesne and Bessemer, on the Union Railroad; at Clarion, on the St. Clair Terminal Railroad; at Etna, on the Etna and Montrose Railroad; at Pittsburgh, for-

merly Allegheny, on the Allegheny Division of the Pittsburgh and Ohio Valley Railway; at Neville Island, on the Neville Island Division of the Pittsburgh and Ohio Railroad; at Pittsburgh, on its own Lucy Furnace tracks, connecting with the B. & A. V. Division of the Pennsylvania Railroad; at Farrell, on the Mercer Valley Railroad, and at Sharon, on the lines of the Pennsylvania Company, the Lake Shore and Michigan Southern Railroad Company and Erie Railroad Company. Its complaint is directed against the Pennsylvania Railroad Company, Pittsburgh and Lake Erie Railroad Company, Baltimore and Ohio Railroad Company, Pennsylvania Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, Lake Shore and Michigan Southern Railway Company, Erie Railroad Company.

The American Steel and Wire Company, complainant in No. 193-5, is engaged in the manufacture of steel products, and has two plants, one located at Pittsburgh, on the Northern Liberties Railway Company, and the other at Donora, on the Donora Southern Railroad Company. It complains against the Pennsylvania Railroad Company, Baltimore and Ohio Railroad Company, Pennsylvania Company, Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

Each of these complaints charges that the respondents, designated herein trunk line railroads, by the cancellation of tariffs providing for allowances for certain terminal services which were performed by the Union Railroad Company, the St. Clair Terminal Railroad Company, the Etna and Montrose Railroad Company, the Pittsburgh and Ohio Valley Railroad Company, the Mercer Valley Railroad Company, the McKeesport Connecting Railroad, the Monongahela Connecting Railroad, the Northern Liberties Railway Company, the Donora Southern Railroad Company, herein designated the industrial railways, and for certain terminal and switch-

ing services performed by the Carnegie Steel Company, complainant, at its Lucy Furnaces in Pittsburgh, at the North Sharon Steel Works and furnaces in Sharon, have imposed the expense of these terminal services upon the complainants.

The complainants allege that the effect of these cancellations is to increase the rates to complainants for the same service. The complainants further allege that such increases are unjust and unreasonable and unduly discriminatory. Another ground of complaint is that the trunk line railroads have, without the filing of any tariff, issued orders that on and after a designated date demurrage will be charged for detention of cars from the time they are placed upon the interchange tracks of the industrial railways until they are returned to the respondent line carriers. It is alleged that this will result in an unjust and unlawful discrimination in favor of other shippers and receivers of like and other commodities in the Pittsburgh and Shenango District.

The answers of the respondents are in direct denial that the rates on commodities received at and shipped from complainants' plants have been unreasonably or unjustly advanced, or that the rates which will be in force, following the cancellation of the tariff, will be unjust and unreasonable or unduly discriminatory, or that thereby the complainants or their traffic will be subjected to any undue prejudice or disadvantage. The complaints were filed prior to the effective date, and, under the Public Service Company Law, the burden of proof rests upon respondents to justify the proposed increased rates.

Upon their petitions, the Commission permitted the St. Clair Terminal Railroad Company, the Etna and Montrose Railroad Company, the Pittsburgh and Ohio Valley Railroad Company, the Mercer Valley Railroad Company, the McKeesport Connecting Railroad Com-

pany, the Northern Liberties Railway Company and the Donora Southern Railroad Company to intervene. Strictly speaking, the issue presents a single and simple question for determination. Have respondents met the statutory burden of proof, justifying the increased rates caused by the cancellation of their tariffs, making certain allowances for services performed by the industrial railways in the placing and picking up of cars at or from the customary points for loading and unloading within the plant limits of the complaining industries?

The tariffs of the trunk line carriers prescribe rates covering the entire transportation service of haulage and delivery to the industries. In fixing these rates the services performed by the industrial railways were included. By withdrawing these allowances to the industrial railways, the complainants are required to bear an additional charge, and if the trunk lines make no corresponding reduction, an increase in rates results.

Inasmuch as no evidence was offered to show that these allowances were too much for the services performed by the industrial railways, or that the transportation rates out of which the allowances were paid were too low, the respondents have not met the burden of proof imposed upon them by our statute, and the cancellation of the allowance tariff cannot stand.

This was our conclusion in the Monongahela Connecting Railroad Company and the Union Railroad Company cases, under very similar circumstances: 1 Pa. P. S. C. Decisions 46; wherein we were constrained, in the light of the decision of the Supreme Court of Pennsylvania, Crane Railroad Company *vs.* Central Railroad Company of New Jersey, 248 Pa. 333, to differ with Interstate Commerce Commission's opinion expressed with respect to these two railroads in Industrial Railways Case, 29 I. C. C. 212.

We may now follow our former opinion with greater confidence, for since its deliveries, and the conclusion of testimony in these cases, the U. S. Supreme Court in the Tap Line Cases, 234 U. S. 1, has established the legal status of incorporated industrial railways and their right to receive from connecting trunk lines allowances out of rates for similar services rendered by them in making delivery of cars to their proprietary companies.

The Interstate Commerce Commission later said it could not distinguish in principle the decision in the Tap Line Cases from the Industrial Railway Cases, and therefore modified its former findings: Industrial Railway Cases, 32 I. C. C. 129.

The situation which confronted complainants, respondents and this Commission during the initial and developmental stages of the instant cases, both with respect to proper administrative policy and substantive law applicable to them, has materially changed.

No doubt the trunk line carriers were led to cancel their allowance tariffs because of the Interstate Commerce Commission's views expressed in Industrial Railway Cases, 29 I. C. C. 212, *supra,* but the later decisions of that Commission, as well as the deliverances of the State and U. S. Appellate Courts, have removed us from the pale of its reasoning and the scope of its authority.

Having determined that there is no evidence in this record with respect to the reasonableness of the increased rates, we are therefore bound under the law and the precedents, Monongahela Connecting Railroad Company, *supra,* and Baltimore Switching Case, 30 I. C. C. 581, to hold that the respondents have failed to justify the increases proposed.

This will dispose of the rate question at least until such time as evidence is presented, justifying a change; there are, however, several questions concerning the character of the services performed by these incorpo-

rated industrial railways and by the Carnegie Steel Company through its own unincorporated railroad which for the future guidance of parties concerned should be answered.

Among the propositions advanced by the respondents were:

First: That services, such as were performed by industrial railways and for which they were receiving allowances from the trunk line carriers, were plant services and not transportation services.

Second: Even if the services might be considered transportation services they ceased to be such when performed by the industrial railways for their proprietary industry.

The common law rule concerning delivery to complete the transportation service has from time to time undergone modifications predicated in part upon requirements of consignees and in part upon the means employed for common carriage. In the days of stage coaches and horse drawn vehicles engaged in public transportation personal delivery was required. It is obvious that railroads could not be held to make such deliveries, and delivery at freight stations and at designated public sidings were held to complete the transportation service. With the industrial development of the country private sidings were installed and the duty of common carriage broadened so as to require cars to be placed thereon, clearing the main tracks. Then warehouses, stores and factories were constructed adjacent to these private sidings, and "spotting" cars at customary points of loading or unloading became a part of the carriers' delivery obligation: Industrial Railway Cases, 29 I. C. C. 212 (226); Los Angeles Jobbers Case, 18 I. C. C. 310 (316); Buffalo Furnace Company, 21 I. C. C. 620 (627). As a means of accomplishing the terminal service in large industrial plants extended

mileage of tracks was required, frequently beyond the ability of the railroads to furnish. These tracks are usually located within the plant confines and so constructed as to enable the expeditious placing of cars at the different points therein where loading or unloading is to be done. In most instances these plant railroads were constructed and operated by the industries themselves, but later many of them, particularly in the Pittsburgh and Shenango districts now under consideration, were incorporated under the general railroad law of the Commonwealth. In practice they receive the cars from the trunk lines at the interchange tracks, classify them in their own yards, according to the materials with which they are loaded, and place them at the customary points of loading or unloading within the plants.

For this service and similar services, these industrial railways, for many years, received from the trunk lines, out of the latter's rates, the allowances prescribed in the trunk line carriers' tariffs. The complainants and the intervenors maintain this to be a transportation service, completing the delivery following the line haul, while the trunk lines insist that the delivery is complete when cars are placed by them on the interchange tracks of the industrial railway, and that the service performed by the latter companies for these proprietary companies is a plant service for which no allowance can be made without subjecting them to the charge of unlawful rebating or discriminatory practices.

The trunk line carriers cancelled their allowance tariffs to industrial railways following the opinion in Industrial Railway Cases, 29 I. C. C. 212, but, as heretofore noted, that opinion has been greatly modified by the distinguished body which announced it, and there have been new lines of demarcation established by the Court, so that what were formerly considered adminis-

trative questions have now been transferred to the body of settled and substantive law.

The development of the expressions of the law since these complaints were filed is evidenced by the following excerpts from decisions:

> "All the service by the line carriers beyond a reasonably convenient point of interchange between the rails of the carrier and the rails of the industry, either within or without the plant, is a shipper's service and not a service of transportation which the line carrier may perform without charge or may allow for out of the rate through divisions or otherwise when performed by the industry or by its industrial railroad, and that the facilities used by the industry in performing the service, whether separately incorporated or not, are plant facilities and plant equipment. We also conclude and find that the delivery of a car by a line carrier upon the exchange track is a delivery to the industry, and that the elimination of demurrage, under the present practices, as a transportation charge against the industry is unlawful and gives the industry so favored an undue and unreasonable preference and advantage. We further find and conclude that undue and unlawful preferences and discriminations arise out of the present practice of the line carriers in performing such services without additional charge and in making allowances therefor out of the rate when performed by the industry or by its plant railway."
>
> Industrial Railways Cases, 29 I. C. C. 212 (237).

Following the Tap Line Cases, *supra*, this opinion was modified:

> "We think that in the light of the decision of the Supreme Court in the 'Tap Line Cases' it is our duty to so modify our findings in the original report herein as to permit the trunk line roads, if they so elect, to arrange by agreement with any of the industrial roads mentioned in our former report which are common carriers under the test applied by the Supreme Court in the 'Tap Line Cases,' and which

perform a service of transportation, for a reasonable compensation for such service in the form of switching charges or divisions of joint through rates."

Industrial Railways Cases, 32 I. C. C. 129 (132).

In the Birmingham Southern Railroad Case, 32 I. C. C. 110, it was held that the service between the trunk line interchange and the interior of the plant is a service of transportation and a part of the through haul.

In the Atchison, Topeka and Santa Fe Railway Company *vs.* Kansas City Stock Yards Case, 33 I. C. C. 92 (98), another feature of the situation was recognized by the Interstate Commerce Commission where it was held:

"Railroads are not required to own all of the instrumentalities required for the performance of the service which they are bound or undertake to perform. They may also lease or hire suitable facilities or discharge a part of their duties through agents and without restriction as to the public or private status of such agents or of the owners of the instrumentalities procured. The only restriction is that contained in Section 15 of the act to the effect that allowances to shippers for furnishing transportation or instrumentalities thereof shall be supervised by the Commission."

In the Chicago Switching Case, 34 I. C. C. 234 (239), the carriers used a system of tunnels carrying narrow gauge tracks under the streets of Chicago to make delivery to the underground shipping rooms of consignees. This service was included in the through rates, and upon the attempt of the carriers to cancel this supplemental service the Interstate Commerce Commission said:

"No good reason appears for placing the industries and shippers who are served by and dependent upon the tunnel and lighterage companies at a disadvantage as compared with other shippers

and consignees in the Chicago district, which by co-operative action of the carriers and for commercial, industrial and competitive reasons has become, and been maintained, as a common rate district or community."

"The justification for cancellation of through rates with the tunnel and lighterage companies consists mainly in the declaration that the line haul carriers are within their rights in taking such action because the service rendered by the tunnel and lighterage companies is a service beyond the rails of the line haul carriers which they have a legal right to insist upon an additional charge. They show the amounts paid to the tunnel and lighterage companies out of the through rates, but they fail to present any evidence to show that the increased charges to those who use or are dependent upon the tunnel or lighterage company would be reasonable, and practically ignore the question of unjust discrimination against shippers and consignees which would thereby be created."

The Mitchell Coal Company Case, 230 U. S. 247 (263) recognized the predominating characteristics of the switching district as including the common delivery and shipping points, and held that the rate running to that district includes a delivery to any point of that district which is accessible by rail. Justice Lamar, who wrote the opinion, said:

"But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield district was treated as a single shipping point, and where the rate, though named and published as from the station, was universally ap-

plied from the mines of the Mitchell Company as well as the other companies named in the declaration and all others located in the Clearfield district."

"Inasmuch as this rate included the haul, the railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor."

In the Second Industrial Railway Case, 34 I. C. C. 596, it was recognized that the industrial railway adjacent to a plant is a legitimate factor of transportation in and out of the plant.

The Car Spotting Case, 34 I. C. C. 609, goes much further and holds in effect that the contract of transportation begins where the car is loaded and ends where the car is destined to be unloaded, no matter where these points may be, whether in or out of the plant. The size of the plant, the complexity of the industrial tracks is no objection or hindrance to the operation of the principle; placing the burden on the carrier in extraordinary cases of establishing a satisfactory reason for non-compliance.

The complainants' testimony that the service tendered by the terminal lines is identical with that rendered by the trunk lines to other industries in the same territory without any charge, in addition to the line haul rate, was not controverted, and it was further established that complainants' plants are located in a territory from and to which rates are made up by the group or zone system. The Pittsburgh rate group extends over a territory of approximately 6,058 square miles and the propriety of this grouping was not questioned, and is apparently justified under Article III, Sec. 9 (*a*) of the Public Service Company Law: Valley Smokeless Coal Company *vs.* Pennsylvania Railroad Company, 4 P. C. R. 611.

The American rule of rate making includes in the freight rate two terminal services, one initial and one final, in addition to the road haul, and based upon the application of this rule, shorter hauls pay a larger rate proportionately to mileage than do the longer hauls. Thus terminal expenses are equitably apportioned. The rule is sufficiently stated in the Car Spotting Charges, 34 I. C. C. 609 (616):

> "It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line haul rate, and in the Los Angeles Case, 18 I. C. C. 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. Los Angeles Case, 234 U. S. 294. The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries. At the large industries the trunk line may render interplant services in the movement of cars from place to place within the plant during the processes of manufacture which it has no occasion to render at smaller industries, and for such services an additional charge should be made; but where the service rendered is merely a substitute for the service which would be required if the movement were to or from a team track, an

industry spur, or a private siding, nothing should be added to the charge for the line haul."

"As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant to now add a charge to the line-haul rate for that service would be revolutionary." * * *

(619) "The argument that while the line-haul rate may cover the movement incident to the receipt and delivery of carload freight when that movement is over an ordinary industry spur it does not cover a like service when the movement is over the interior tracks of an industrial plant is founded upon the assumption that the carrier and the industry have the joint use of the industry spur while the interior tracks of the industrial plant are used exclusively by the industry. The fact is, however, that the service which the carrier renders in the movement of cars over the interior tracks of the industrial plant for the purpose of receiving and delivering carload freight of the industry is a public service, and the tracks are used both for that public service and for the private purpose of the industry. It is immaterial that the carrier may not use the tracks for all the purposes for which it uses the ordinary industry spur. The difference is merely one of degree and not of kind."

The fundamental principle of American rate making is that the freight rate should cover the entire carriage of taking the goods up, transporting them to their destination and setting them down: Union Trust Company *vs.* Atchison, T. and S. F. R. R. Company, 64 Fed. Rep. 992 (994):

"The freight demanded covers the entire service of the carrier from depot to depot. It is in law the compensation, not only for the actual carriage, but also for the facilities furnished for loading and unloading. The service is a single one, and the com-

pensation is likewise single. The law will not permit the charge for such single service to be divided. A carrier cannot make up its bill of charges in items—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The freight is not an aggregate of separate charges, but a single charge. This policy of the law is not because a particular shipper might not deal with the carrier as intelligently in the case of one method as in the other, but because the public is not so likely to deal intelligently with a series of items as with a single freight rate. The shipper may be intelligent or unintelligent, ignorant or educated, accustomed to business, or inexperienced in such affairs, deliberate and careful, or hasty and uninquiring. The service of the carrier is for one as well as the other. A single charge presents to him at once the whole problem. A series of charges might confuse him, and leave uncertain what, in the end, the aggregate would be."

See also Covington Stock Yard Case, 226 U. S. 286. In the Minnesota Rate Case, 230 U. S. 352 (84), Justice Hughes said:

"Every rate comprehends two terminal charges, the initial and the final, and a haulage charge. It is declared to be a cardinal principle of rate making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; for even if the haulage charge in the former case were the same per mile, the rate per ton mile should be less for the longer haul, as the terminal charges would be spread over a greater distance."

And the presumption is that the imposed rate for carriage includes adequate compensation for terminal services: Interstate Commerce Commission *vs.* C., B. & Q., 186 U. S. 320 (326).

The English decisions afford very little assistance, for there, under the English Railway and Canal Traffic act, the road haul and the terminal services are subject

to separately imposed rates: Los Angeles Jobbers Case, 18 I. C. C. 310.

From these cases it would appear that in the absence of evidence of unusual circumstances making them exceptions to the rule, the complainants are entitled, as a part of the carrier's duty of common carriage, to have their carload shipments delivered at the customary points for loading or unloading in their plants and without any expense to them other than as included in the line haul rates, a delivery similar to that on private sidings of other industries in the same territory.

This duty of delivery resting upon the carrier, he is not bound to perform the service with his own power "and there is nothing to prevent his hiring the instrumentality instead of owning it." Sugar Lighterage Case, 231 U. S. 274 (58 Law Ed. 218); Kansas City Stock Yard Case, 33 I. C. C. 92.

> "Manifestly it is unfair that some shippers should perform the service of spotting cars at their own expense while many of their competitors in the same industrial district have this service performed by and at the expense of the carriers. The line-haul service of course varies as to shipments transported by different lines for the same shipper and by the same line for different shippers, although all may pay the same rate; but for this service it is impracticable to grade rates with such nicety as to make them absolutely dependent upon every slight variation in the measure of service rendered. The service of handling traffic from the line-haul carriers' interchange tracks to the points of placement on the private industry tracks within the shippers' plants, at times and in the quantities to suit the convenience of shippers is, however, distinctly different in character from the line-haul service. Obviously it is discriminatory for the carriers to place ore shipments for some shippers on private tracks within their plants at the points of unloading while other shippers are served only at the gates of their plants,

or at the point of interchange with the industry tracks." Iron Ore Rate Case, 41 I. C. C. 181 (200).

There is little doubt that the operation of these industrial railways promotes efficiency and economy. Power under one control is admittedly desirable, and particularly where there is more than one trunk line connection, and permits the placement of cars for loading and unloading at the times when that work can be most expeditiously and advantageously accomplished. In some instances the inter-mill work is performed by the industrial railway, and some of the more modern plants have been designed with a view to having these services performed by the power of the industry (or industrial railway) and not by the power of the railroad company.

That the terminal service can be performed by the terminal lines at much less cost than if rendered by the trunk lines themselves is established. The service in placing cars for the iron and steel industry is not so arduous or complicated as in other industries, as large sums have been invested by them in providing adequate terminal facilities, an expense of which the trunk lines have been relieved, and a service for the performance of which they are not equipped: Car Spotting Case, 34 I. C. C. 609 (615).

For perhaps twenty years in the Pittsburgh and Shenango District, these or similar allowances have been treated as covered by the line haul rate and an additional charge to the complainants for the service covered by these allowances is not proper: Car Spotting Case, 34 I. C. C. 609 (616).

Section 1 (*e*), Article III, of the Public Service Company Act, provides:

"Whenever any owner of property transported by any common carrier, or any user or patron of any other public service company, renders, directly or indirectly, any service connected with such transportation or other public service, the charge and

allowance therefore shall be no more than is just and reasonable; and the Commission may, after hearing, on its own motion or upon complaint, determine what is a reasonable charge, as a maximum, to be paid by the carrier or other public service company for the use of the service so furnished or rendered, and what is a proper proportion of the said cost, and fix the same by appropriate order, to be observed and enforced by the parties concerned."

Predicated upon this section which is substantially similar to a provision in the Interstate Commerce Act, the complainants maintain that the rights of the owner to demand and receive reasonable compensation for services rendered in connection with the transportation is established.

Justice Holmes in the Grain Elevator Cases, 222 U. S. 42 (46), in affirming the judgment of the Circuit Court, 176 Fed. Rep. 409 (which see) held:

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the Act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter he shall pay for them. That is taken for granted in Section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or, now, upon its own motion: Act of June 18, 1910, c. 309, 12, 36 Stat. at L. 539, 553). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable and it is admitted that three-quarters of a cent barely would pay the cost of the service rendered without any reasonable profit

to Peavey & Co. for the work. See I. C. C. *vs.* Stickney, 215 U. S. 98."

And a carrier has a right under the act to regulate commerce to pay shippers a reasonable allowance for services in connection with the transportation of goods shipped by them. Mitchell Coal Case, 230 U. S. 247. To the same effect is Sugar Lighterage Case.

> "Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street Station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed." Sugar Lighterage Case, 231 U. S. 274 (292).

The record in this proceeding shows that the expense of the terminal transportation service such as performed by the intervenors' railroads, to-wit, the classification of the cars with respect to destinations of consignees and the switching of cars to and from points of loading and unloading on the spur tracks of the industries, is included in the through rates to and from the Pittsburgh and Mahoning and Shenango Valley districts, and is a part of the transportation which the respondent railroads are under obligations to perform, and that such terminal transportation service is done by intervenors' railroads, at the instance and procurement of the carriers; and in such circumstances, under the authorities cited, the owner of the freight thus transported is entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed, where the services and facilities are performed by an unincorporated railroad, such as the Lucy Furnace Railroad of the Carnegie Steel Company. Such allow-

ances are not purely permissive as counsel for defendants contends, but mandatory where the owner of the property furnishes facilities, in connection with transportation.

The argument that a service by an industrial railway which is a transportation service when performed for a non-proprietary industry becomes a plant service when performed for its proprietary company, is not convincing, and in any event falls in the light of the decision in Tap Line Case; 234 U. S. 1 (28) where it was held:

> "As we have said, the Commission by its order herein required the trunk lines to re-establish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves." See also Los Angeles Switching Case, 234 U. S. 294.

The decision of the Interstate Commerce Commission in the Lorain case (National Tube Company *vs.* Baltimore and Ohio Railroad Company, 50 I. C. C. 485) affords us very little assistance. The majority opinion therein is a restatement of the minority views expressed

in several of its deliverances since Industrial Railways Case, 29 I. C. C. 212, was decided. It is a retrogression to the position taken in that case and which the Commission abandoned, following the decision in the Tap Line Case, *supra*. The minority opinion in the Lorain case prepared by Commissioner Hall points out: "The majority report declares unlawful what we have heretofore found lawful", and "undoes what we have done". "It is", said he "in essence a return to the doctrine originally announced in the Industrial Railways case * * * and which we abandoned in view of the Supreme Court's opinion."

He further stated that which we believe to be fundamental in considering cases of this kind: "Our function is to regulate and not to prohibit divisions between trunk lines and industrial roads." Whenever the circumstances disclose, as in this instant case they do not, that the rates are unjustly discriminatory or unduly or unreasonably preferential, it is within the power and it is the duty of the Commission by appropriate order to correct the evil. On the whole, we are constrained to accept the view and reasoning of the minority, believing that the majority opinion is out of harmony with the trend of the decisions of the courts, and that if followed it would again throw the whole industrial railway administrative policy into a chaos of incertitude from which it was therefore rapidly and happily emerging.

Based upon the foregoing authorities, we conclude:

First: The services performed by industrial railways in placement of cars at customary points for loading or unloading within the plant industry, when performed in connection with an intrastate road haul over respondents' lines, is a terminal transportation service for which the industrial railways are entitled to reasonable allowance out of the through line haul rates.

Second: These services when performed by industrial railways for their proprietary industries do not therefore cease to be transportation services.

Third: The complainants are entitled to placement of cars as part of the transportation service, the railroads must under the disclosed circumstances employ the incorporated railroads and make allowances to them out of the line haul rate. They *may* employ the railroads' facilities of the plant industries where the railroads are not incorporated, in which event the trunk line must make similar allowances.

Jurisdiction for the purpose of determining whether and what reparation should be awarded will be retained and hereafter heard upon separate petitions.

(Signed) WM. D. B. AINEY,
Chairman.

FILED
APR 6 1937
CHARLES ELMORE CROPLEY
CLERK

No. 734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

THE AMERICAN SHEET & TIN PLATE COMPANY, ET AL., *Appellees.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Brief on Behalf of Certain Railroad Companies, as *amici curiae*

THOMAS P. HEALY,
GUERNSEY ORCUTT,
ANDREW P. MARTIN,
MARION B. PIERCE,
CHARLES R. WEBBER,
M. CARTER HALL,
JERVIS LANGDON, JR.,
Solicitors for Railroad Companies, as Amici Curiae.

April 1, 1937.
1500 First National Bank Bldg.,
Richmond, Virginia.

LEWIS PRINTING CO., INC., RICHMOND, VA.

SUBJECT INDEX

Page

PRELIMINARY STATEMENT 2

SUMMARY OF ARGUMENT 2

POINT ONE 4

SPOTTING SERVICE IS NOT IN EXCESS OF TEAM TRACK OR SIMPLE SWITCH PLACEMENT 4

POINT TWO 7

THERE IS NO SUCH "INTERRUPTION OR INTERFERENCE BY THE DESIRES" OF THE APPELLEES OR THE "DISABILITIES" OF THEIR PLANTS AS TO WARRANT THE COMMISSION IN CONDEMNING THE SPOTTING SERVICES THERE PERFORMED 7

A. There is no such "interruption or interference" arising from the "desires" of the industries 7

B. There is no such "interruption or interference" arising from the "disabilities" of their plants, such as the manner in which the industrial operations are conducted, the arrangement or condition of their tracks, weighing service, or similar circumstances 14

(1) *There are no such disabilities arising from the manner in which the industrial operations are conducted* 14

(2) *There are no such disabilities arising from the arrangement or condition of their tracks* 15

(3) *There are no such disabilities arising from the performance of a weighing service* 18

Page

POINT THREE 21

THE SPOTTING SERVICE AT THESE PLANTS IS, BY CUSTOM, INCLUDED IN THE LINE HAUL RATES 21

POINT FOUR 33

THE PAYMENT OF ALLOWANCES TO COVER SPOTTING SERVICES, OR THEIR PERFORMANCE BY THE RAILROADS, IS IN CONFORMITY WITH EFFICIENT AND ECONOMICAL MANAGEMENT AS CONTEMPLATED BY THE INTERSTATE COMMERCE ACT 33

CONCLUSION 35

APPENDIX A 36

CASES CITED

	Page
Allegheny Steel Co. v. Director General, 60 I. C. C. 575	17, 29, 30
American Trucking Associations, Inc. v. United States, 17 F. Supp. 655	7
Atchison, Topeka & Santa Fe Ry. Co. v. United States, 222 U. S. 199	13
Bituminous Coal to C. F. A. Territory, 46 I. C. C. 66	32
Car Spotting Charges, 34 I. C. C. 609	25, 28
Carnegie Steel Co. v. Director General, 132 I. C. C. 689	31
Central Iron & Steel Co. v. Pennsylvania R. Co., 59 I. C. C. 385	30
Central Pennsylvania Coal Producers Assn., et al. v. B. & O. R. Co., et al., 196 I. C. C. 203	32
C. & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., Inc., 270 U. S. 260	23
Coal, Bituminous, Ex-River, from Colona and Conway, Pa., to Youngstown, O., 197 I. C. C. 617	32
Coke between Points in Central and Illinois Territories, 194 I. C. C. 640	32
Consolidated Stone Cases, 200 I. C. C. 65	32
Donner Steel Co., Inc. v. Delaware, Lackawanna & Western R. Co., 57 I. C. C. 745	30
Eastern Brick Rates, 218 I. C. C. 59	33
Florence Pipe Foundry & Machine Co. v. Pennsylvania R. Co., 188 I. C. C. 215	30
General Electric Co. v. N. Y. C. & H. R. R. Co., 14 I. C. C. 237	7, 27, 28
General Electric Co. v. N. Y. C. & H. R. R. Co. 219 N. Y. 227	27
Industrial Sand Cases, 1930, 188 I. C. C. 99	32
Interstate Commerce Commission v. Stickney, 215 U. S. 98	23

Page

Intrastate Rates on Bituminous Coal Within Ohio, 192 I. C. C. 413 32

Iron and Steel Articles, 155 I. C. C. 517; 161 I. C. C. 386; 161 I. C. C. 608 31

Iron Ore Cases, 41 I. C. C. 181; 44 I. C. C. 368 31

Lime from Eastern Trunk Line Points to Pittsburgh, Pa., Youngstown, Ohio, and related points, 93 I. C. C. 617 33

Louisville & Nashville R. Co. v. United States, 282 U. S. 740 29

Lumber Between Points in Official Territory, 214 I. C. C. 493; 219 I. C. C. 429 33

Merchant Truckmen's Bureau of New York v. United States, 16 F. Supp. 998 7

Merchants Warehouse Co. v. United States, 283 U. S. 501 29

Mitchell Coal & Coke Co. v. P. R. R., 230 U. S. 247 23

Nekoosa-Edwards Paper Co. v. Railroad Commission, 213 N. W. 633 27

Ohio Lime Mfgrs. Assn. v. P. R. R., 214 I. C. C. 417 33

Ohio-Michigan Coal Cases, 80 I. C. C. 663 32

Pick-Up and Delivery in Official Territory, 218 I. C. C. 441 ..... 6, 34

Pittsburgh Plate Glass Co. v. Director General, 58 I. C. C. 81 ..... 29, 30

Rates on Raw Dolomite and Fluxing Stone within State of Ohio, 188 I. C. C. 495 33

Riter-Conley Mfg. Co. v. Director General, 58 I. C. C. 327 30

Stewart Iron Co. v. Pennsylvania Co., 47 I. C. C. 512 30

Union Stock Yards Co. v. United States, 169 Fed. Rep: 404, 406 20

United States v. Union Stock Yards Co., 226 U. S. 286 20

Wight v. U. S., 167 U. S. 512 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 734

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

vs.

AMERICAN SHEET & TIN PLATE COMPANY, *Appellee*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

vs.

PITTSBURGH PLATE GLASS COMPANY, *Appellee*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

vs.

WEIRTON STEEL COMPANY, *Appellee*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

vs.

ALLEGHENY STEEL COMPANY, *Appellee*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

vs.

WEST LEECHBURG STEEL COMPANY, *Appellee*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

vs.

PITTSBURGH PLATE GLASS COMPANY, *Appellee*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Brief on Behalf of Certain Railroad Companies, as *amici curiae*

PRELIMINARY STATEMENT

With the consent of the parties, this brief is respectfully filed on behalf of a large group of railroad companies as listed in Appendix A. Operating generally in the eastern industrial states, these railroads are greatly interested in the questions presented in the cases at bar and urge the affirmance of the decree of the lower court.

In the proceedings before the Commission which gave rise to the instant litigation, these railroads took the position, to which they still adhere, that the service of placing cars at convenient points of loading and unloading within industrial plants similar to those of appellees'—a service hereinafter referred to as "spotting"—is an integral part of their transportation obligation under the regular line haul freight rates. Accordingly, they do not subscribe to the general findings of the Commission which underlie the orders herein involved but, on the contrary, believe that they are grounded upon incorrect conclusions of fact and represent the repeated misapplication of sound principles of law.

SUMMARY OF ARGUMENT

(1) The spotting service performed for industry in general and for the plants involved in these cases in particular is not in excess of team or simple switch placement. And even if it be assumed to be, *arguendo*, there is nothing in the law to condemn such service.

(2) There is no such interruption or interference arising from the "desires" of the owners of the plants, i. e. the appellees, as to warrant the Commission in condemning the spotting services there performed. Under the law no allowance for a spotting service should be paid where an industry withholds permission to enter the plant, and of this principle of law the railroads, in employing agents, are aware. But in the cases at bar it is clear that the Com-

mission has gone beyond a fair application of this principle and arrived at unreasonable and arbitrary results.

(3) The Commission's findings of interruption or interference arising from the "disabilities" of a plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, are, as exemplified by the cases at bar, unwarranted. The railroads agree that where the disabilities of a plant give rise to interruption or interference which cannot be removed and render their performance of a spotting service impossible, delivery is accomplished by the placement of cars upon interchange tracks (located at or near the plant gates). However, the railroads contend that, in the instant cases, the Commission has, in many particulars, misconstrued this legal concept. That the convenience of a plant is served in the spotting of cars, as a matter of operating routine, does not render such service unlawful, and an obligation under line haul rates to perform such service, once properly established, cannot be repudiated solely because, for the purpose of serving their own ends, the railroads have increased the size, or changed the type of the locomotives which are available in the vicinity. Moreover, the legality of a spotting service does not depend upon whether it can be accomplished, as found by the Commission, "in one uninterrupted movement" at the railroad's operating convenience.

(4) The spotting service performed for industry in general, and for these plants in particular, is customary and included in the line haul rates. This is apparent from many findings of the Commission, some of which deal with the very same spotting services as here in issue. It is also apparent from the recognized scope of the line haul rates which the Commission has, from time to time, prescribed on various commodities.

(5) Finally, the performance of a spotting service by the railroads, or the payment of an allowance therefor, is in conformity with efficient and economical management as contemplated by the Interstate Commerce Act. While the Commission makes findings to the contrary in its general report, they are based upon no substantial evidence of record and cannot be sustained.

POINT ONE

Spotting Service is Not in Excess of Team Track or Simple Switch Placement.

Although apparently *abandoned* in appellants' argument before this Court, one of the principal grounds assigned by the Commission for finding the spotting service to be unreasonable and preferential is that, as stated in the typical case of the appellee Weirton Steel Company, "such switching is in excess of team track or simple switch placement" (R. 103).

This finding, however, rests upon no factual basis; there is no evidence in the record to support it. Indeed, the Commission in one breath adopts a standard or measure of service obtainable under line haul rates, and in the next breath finds to have "merit" the argument that such standard or measure cannot be defined. In its general report the Commission says (R. 37):

> "The argument has also been advanced on brief that a general definition of what constitutes the equivalent of team track or simple switch placement by the carriers involved herein can not be made. We are inclined to the belief that this argument has merit, but this assumption does not conflict with our view, which is that a determination of what constitutes a carrier's duty with respect to the equivalent of team track or simple switch placement can readily be ascertained at

> any individual industry by experienced railroad operating men or committees if honestly [sic] performed without consideration of traffic reasons."

Instead of supporting the Commission's finding, the unchallenged testimony of competent railroad officials supports *only* a contrary one. According to the Assistant General Manager of the New York Central Railroad (R. 303):

> "There is little difference between an industrial track or a spur and team track, because on the team track we have more or less spotting to do, such as automobiles and cars requiring crane unloading, or some instances where we have platforms at our team tracks, where meat is unloaded, other places where chickens are unloaded and they are taking team delivery at certain spots where they can be handled, where we have facilities for handling different commodities, so all in all it is about on the same basis."

Again, the Assistant General Manager of the Erie Railroad says (R. 273):

> "The most expensive, as regards time, is the placing of cars on a siding at a particular door which involves the shifting of cars already on that particular track. This usually occurs on small sidings or spurs rather than on the industrial tracks of large plants."

The subject is well considered in the testimony of the General Manager of the Lehigh Valley Railroad (R. 283):

> "Ordinary sidings are considered as more or less a substitute for team track delivery, you could term it that way. In some instances delivery on sidings is found to be more difficult than delivery on team tracks and in other instances less difficult.
>
> * * * * *

> "Substantially the same conditions exist in connection with the systems of plant tracks as with the ordinary single private sidings. There is very little difference—there is no difference in the way the work there is performed except in the number of tracks.
>
> * * * * *
>
> "Looking at the matter as a whole, from an operating standpoint and generally speaking, it is as economical to place cars on a plant track as it is to place them on a private siding or team track * * *."

In the words of the Vice-President of the Pennsylvania Railroad (R. 455):

> "I am convinced in my mind that the handling of cars to and from team tracks perhaps shows as much or more interference than you get at industrial plants where we have systems of tracks."

Even if, *arguendo*, it be assumed that spotting at the industries is in excess of the service accorded in team track or simple switch placement, contrary to the explicit testimony of record, there is nothing in the law to condemn it. As frankly stated in the Commission's general report (R. 16): "In the nature of things no inflexible formula can furnish a solution for that problem * * * when delivery at the plant is made." The Court may judicially notice the fact that, under tariffs recently found justified by the Commission, the railroads now receive and deliver less carload freight at the customer's door under the regular line haul rates, just as the carload freight involved in this proceeding is spotted at the industry's unloading platform under the same rates. In both cases the measure of the delivery service is the same; in both cases the performance may be by the patron, as a carrier agent, or by the carrier principal itself. *Pick-Up and Delivery in Official Territory*, 218 I. C. C. 441. Two specially constituted United States District Courts have refused to disturb the Commission's order in the

cited case. *Merchant Truckmen's Bureau of New York* v. *United States,* 16 F. Supp. 998; *American Trucking Associations, Inc.* v. *United States,* 17 F. Supp. 655.

POINT TWO

There is No Such Interruption or Interference Arising from the "Desires" of the Appellees or the "Disabilities" of their Plants as to Warrant the Commission in Condemning the Spotting Services There Performed.

In its general report the Commission finds, furthermore, that delivery beyond the interchange tracks at large industrial plants, such as those of appellees, cannot be effected "without interruption or interference by the desires of the industry, or the disability of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances" (R. 43).

We proceed directly to a consideration of the validity of these conclusions which underlie the Commission's findings of unreasonableness and preference in the spotting service generally.

A. Interruption or Interference Arising From the "Desires" of An Industry.

The railroads are, of course, aware that under the law no allowance should be paid where an industry withholds permission to enter the plant. In accordance with the Commission's own interpretation, this is the only point for which *General Electric Co.* v. *N. Y. C. & H. R. R. Co.,* 14 I. C. C. 237—a decision heavily relied upon by the appellants—is a direct authority.[1]

---

[1]See discussion of this case, pages 27 to 29, *infra,* including foot-note 8.

But none of the cases at bar presents that issue (R. 458). In the plant of one of the appellees the railroad itself performs the spotting service (R. 210, 214). In another, the railroad once performed the service but later substituted an allowance in the interest of efficiency and economy (R. 206, 207). With the others, there is no evidence to show that the appellees would object to the railroads' performing the spotting, *and there is every implication to the contrary* (R. 233, 220, 216, 217, 202).

(1) The Commission, however, misapplies this sound principle of law and holds that where, by its nature, a plant requires spotting more or less at its own "convenience" and in accord with its "directions" there is sufficient evidence of interruption or interference arising from the "desires" of an industry as to make unreasonable a delivery beyond the interchange tracks. In the case of the plant of the appellee Pittsburgh Plate Glass Company at Ford City, Pa., for example, the Commission finds that "no obligation rests upon the carrier to perform switching and spotting service solely at the convenience of the industry" (R. 85, 86). And yet this convenience could easily be served by the carrier as a matter of operating routine. As stated by the Assistant Superintendent of that appellee (R. 216):

> "It is my judgment that The Pennsylvania Railroad could at the present time enter the plant and perform spotting with its own power without interfering with our industrial processes. Our engine makes an average of three trips a day to the interchange track, and the practice each trip is to clear the interchange. We gather loads from the spots at least twice a day. One locomotive could perform all our spotting service at this plant, if it were there at the proper hours, that is, at hours which would have to be designated by the industry. Normally we require a locomotive only five or six

> hours a day for interchange service, between the hours of 10 a. m. and 4 p. m. During that period our own power can be engaged in intraplant work."

Again, in the case of the plants of the appellee American Sheet and Tin Plate Company, it was testified by a representative of the industry that (R. 234):

> "If the Pennsylvania were to undertake to perform that service I don't have any idea that it would require the assignment of one or more locomotives for constant service at the plant on the industrial tracks, at all times, for the spotting service alone, but that depends a great deal on the amount of work to be done. The Pennsylvania would be required to place the cars after their arrival at Vandergrift as needed. To do that would necessitate co-operation between the industry and the R. R. in the matter of the assignment of a locomotive to the plant by the railroad to perform the spotting service. That could be arranged to conform to our needs. The interchange service, as a practical operating matter could be performed without any interference between the railroad power and the intraplant service. I don't think there would be any interference."

Certainly railroads must be free under the law to give delivery services such as described above. If this right be withheld, competing transportation agencies will take the business away from them. The Commission, it is submitted, goes too far. Of course, the railroads are attempting to serve industrial convenience. In no other way can they hope to remain an effective agency of transportation. To hold that the railroads, in making deliveries, cannot respect a shipper's convenience, or be guided by his reasonable directions, is tantamount to denying them an opportunity to compete in an era when competition among various transportation agencies knows few bounds.

No longer is the railroad a virtual monopoly; nor can it afford to be arbitrary and insensitive to the requirements of its patrons; nor can it survive under a "take it or leave it" policy. As stated by the Vice-President of the Pennsylvania Railroad (R. 453):

> "We should do all we can within the spirit of the law to make the industries connected with the rails of the carriers thoroughly comfortable in their transportation problems * * *. One of the important functions surrounding the efficient handling of plant operations undoubtedly lies in the spotting service. The originating and delivery of traffic is an important and integral part of the entire service rendered by a carrier.
>
> "In these times the railroads cannot afford to give up any advantage that they still possess over the competition of highway transport * * *. It is important, therefore, that the railroads shall hold on firmly to every advantage that now accrues to them in the performance of spotting, associated with private sidings and industrial tracks, and make them so useful to industries that there will be a minimum of diversion to highways and competing waterways."

And again (R. 459):

> "About 83 per cent of the tonnage of the Pennsylvania Railroad is handled to and from private sidings, if you exclude perishable freight, which is always on team tracks. Now, think what it would mean to our company to throw open all that traffic, or a large part of it, to the highway. That is one of the last big things we have got left with industry in this country, and the reason so many industries still stick, and say this country could not exist without the railroads, is because of the great efficiency that comes from these private sidings in the operations

of plants, and for that reason we have got to co-operate with them and we have got to block out this highway thing, these unregulated carriers."

And again (R. 459):

"* * * industries were located and built upon a definite understanding that spotting service would be accorded in the line-haul rates. I have myself assisted in locating many industries, and I consider it one of the most important things of the traffic officials of the Pennsylvania Railroad to locate industries on our railroad. You locate a nice industry about five miles from the town; you say to them, 'You don't have to come in town. Buy your property cheaper. Don't use the team tracks. Build your own siding. We will give you the service.' Now, you say to them, after it is all settled and the wheels are turning and the product is moving, 'We wish you prosperity. Grow and grow bigger all the time.' Then the minute it gets big you step in and say, 'Now you have got too big. We are going to charge you $2 a car.' There is nothing fair about that."

Moreover, there is not a word of testimony in the record to support the Commission's conclusion that, when an industry obtains spotting service under its "direction", it is "necessarily" preferred (R. 32). Certainly the team track shipper has not complained, nor has the industry which is served by what the Commission constantly refers to as a simple switch siding. There is no evidence that the traffic of such smaller shippers is handled with relatively less convenience to them, or in disregard of their instructions. The only fair conclusion to draw is that the convenience of every shipper, large or small, is consulted nowadays by the railroad, and every proper effort made to arrange service which will meet their particular needs.

According to the General Manager of the Lehigh Valley Railroad (R. 277):

> "We could hardly do any spotting at our convenience. We have got to consider the requirements of the receiver in all of our spotting on team, private track, or system tracks. We do spot cars on the team track or on ordinary spur track without consulting the consignee, but if we have a shipment for team track or private track that a shipper wants, [and if] it is not just as handy for us to place it in the morning as it is in the afternoon, and he wants it in the morning, we place it in the morning. We can't consult our convenience in any instance, naturally."

The fact that, at certain large industries, the assignment of engines and crews for "on call" or "standby" service is, or would be required to perform the spotting only indicates the volume of the extremely welcome traffic. In the case of the appellee Weirton Steel Company, for example, where the Commission holds (R. 102), that the carrier "is under no legal obligation to spot cars solely at the (industry's) convenience," it appears that "an engine must be at hand all day long * * * standby service 24 hours a day, 7 days a week" (R. 213). It further appears, however, that "in normal operation this engine does not have any idle time" (R. 213). The railroads only wish that the business of more team track shippers would warrant "standby" service, despite the well known fact that their cars of perishables, automobiles, chickens, and packing house products are moved with precision, and delivered upon expensive *railroad* property (R. 455, 464, 272, 283, 303, 305). See Commissioner Mahaffie's dissent (R. 44).

(2) The Commission again misapplies the same principle of law in finding that, where an industry has demon-

strated greater efficiency in performing the spotting service than has the carrier, there is sufficient evidence of "interruption or interference" arising from the "desires" of the former as to make unreasonable a delivery beyond the interchange tracks.

In the case of the appellee West Leechburg Steel Company, for instance, the carrier once performed the spotting but later substituted an allowance in order to save money and give a more satisfactory service. As explained by a railroad witness (R. 208):

> "There is nothing unusual in the operation of this plant. The demands of this company are not unreasonable as compared with other steel industries. The local service of the Pennsylvania just could not keep up with the operations. If this plant was in Pittsburgh instead of out in the country, the servicing of this plant would not be so costly. The present arrangement is more economical for the Pennsylvania and more satisfactory to the industry."

Surely it cannot be held that, because there is a natural reluctance to supplant satisfactory performance[2] by the

---

[2]It is the testimony of railroad officials that an industry can perform the spotting more cheaply than can the railroad owing, principally, to different labor rates and requirements (R. 501, 469, 426,-7, for example). As stated in the Commission's general report (R. 36): "The industries generally use small locomotives, have fewer men in the switching crew, and pay lower wages than the railroad. Thus if railroad engine-hour costs are computed on the basis of the number of engine hours charged by the industry to interchange switching, it is clear that the cost to the railroad would be greater. However, if the spotting service which the industry performs is not one which the duty of the carrier requires it to perform, the cost thereof whether great or small is of no concern and no economy to the latter."

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 222 U. S. 199, 217, this Court said: "Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers * * *."

agent with costlier and less satisfactory performance by the principal, there is interruption or interference arising from the desires of the industry. A carrier should be permitted to exercise its discretion without limiting the service available under its line haul rates. And an inclination on the part of an industry to perpetuate efficient operations should not be construed as an active desire to exclude the carrier from the plant.

B. Interruption or Interference Arising From the Disabilities of a Plant, Such as the Manner in Which the Industrial Operations Are Conducted, the Arrangement or Condition of Its Tracks, Weighing Service, or Similar Circumstances.

Here, again, the Commission misapplies another sound principle of law. The railroads readily agree that where the disabilities of a plant give rise to interruption or interference which cannot be removed, and render their performance of a spotting service impossible, delivery is accomplished by the placement of cars on interchange tracks. But the railroads do object to the Commission's application of this principle as exemplified by the orders in issue here.

(1) *The disabilities of a plant arising from the manner in which the industrial operations are conducted.* There may, perhaps, be instances where such disabilities are insurmountable. But in applying the principle in the instant cases the Commission has gone no further than to ascertain whether, in its judgment, an overnight change from performance of the spotting service by the industry agent to performance of the same service by the carrier principal could be accomplished without any confusion. Obviously, where an allowance has been paid for a number of years and carrier and industry operations have become adjusted to

such an arrangement, it is unreasonable to condemn the allowance *today* because the carrier could not perhaps perform *tomorrow*. In such circumstances, it is submitted, the carrier's recognized duty under line haul rates remains unimpaired provided, of course, a breathing spell and rearrangement of affairs by the principal and the agent—which rearrangement might entail some expense on the part of both—would permit performance by the principal. As explained by a representative of the appellee American Sheet and Tin Plate Company (R. 235-6):

> "Under our present method of operation, there would be no interference if the railroad undertook to perform the terminal service and were in there at the same time our own engines were in there. If the railroads were to perform the spotting service at both Vandergrift and Scottdale, I don't believe in the beginning they would be just as efficient in all particulars if it were performed as the industry's power, for the reason that the railroad employees would not be as familiar with the industrial requirements as our own employees. Eventually they should be just as efficient. That is the only factor relative to efficiency that I can think of at present, although there may be others. If the carriers performed the service, I don't think they would perform the spotting work without any regard to the work of the industry. If the interchange service were performed by the railroads and the intraplant switching by the industry, it would require some cooperation between the two sides."

(2) *The disabilities of a plant arising from the arrangement or condition of its tracks.* The disabilities as found by the Commission are often those which would only be encountered through the use of modern railroad locomotives available in the immediate locality. But clearly such a view is too narrow. An obligation under line haul

rates to perform a spotting service, once properly established, is not thereafter subject to restriction solely because a railroad, to serve its own ends, has increased the size, or changed the type of its available locomotives. It can hardly be said, for instance, that a railroad, by electrifying certain tracks, automatically absolves itself from the duty of serving every industry the private facilities of which are not equipped to receive electric locomotives, and yet that is the ultimate and logical result to which the Commission's findings lead. Moreover, there can be no possible public interest in forcing an industry, which performs the spotting service as a railroad agent, to make needless expenditures in keeping pace with the developments and improvements in modern railroad science—all in order to obtain the delivery service contemplated by the freight rates it pays. As stated by an operating official of the Pennsylvania Railroad (R. 238):

> "If the American Sheet & Tin Plate Company were to straighten out all the curves and make an ideal track at its Vandergrift plant, so that our largest switch engines could be accommodated, and then continue to do the spotting for $1.10, we would still have to put additional power at that plant. I don't see how it would benefit us any. If the industry is doing the switching it doesn't make any difference how bad the track is, or how expensive it is to them to perform it over and above $1.10, because that is all we pay."

Nor can there be any public interest in requiring the railroads to keep on hand locomotives which either once negotiated the tracks, or could have negotiated them. And yet, if either of these completely uneconomic programs had been followed in the cases at bar, the Commission would have had no "disabilities" arising from "the arrangement

or condition" of the plant tracks to point to as supporting its findings.

An illustration of the Commission's misapplication of this legal principle is to be found in its condemnation of the allowance now being paid to the appellee Allegheny Steel Company for spotting at its Brackenridge, Pa., plant. In its report dealing with this allowance the Commission, as evidence of its unlawfulness, emphasizes that "an operating witness for the Pennsylvania testified that the industry tracks will not accommodate the railroad switching locomotives operated in this locality" (R. 68). However, the Commission *also* finds that "smaller locomotives are in use elsewhere" and apparently overlooks the significance of the fact that, in 1920, it expressly sanctioned the payment of this allowance as one of two methods of satisfying a complaint of discrimination filed by the appellee (R. 67-8). *Allegheny Steel Co.* v. *Director General*, 60 I. C. C. 575. Thus in 1920, certainly, the spotting service at this plant was included in the line haul rates; were it otherwise, as we shall see,[3] the complaint could only have been summarily dismissed in its entirety. Yet the Commission *now* holds the same allowance, *so inaugurated under its sanction*, to be unlawful because, among other reasons, smaller locomotives "in use elsewhere" would have to be pressed into service should the carrier itself perform the spotting service. It is submitted that a railroad's recognized duty under line haul rates does not vary with the size, or type of the equipment which happens to be in the neighborhood. The problem is well considered in the testimony of the Vice-President of the Pennsylvania Railroad (R. 458):

> "In regard to the engine negotiating the tracks, of [or] their inability to do so, there are cases where a

[3]See discussion pages 29 to 31, *infra*.

plant facility allowance was made 20 years ago, and at that time there was an engine in that vicinity that could negotiate all the tracks. If today the railroad company said, 'We are going to stop you as our agent doing this work; we are going to undertake this work again ourselves; so clear the deck so we can go in'; then we can't negotiate the track. Do you think that would be fair? I don't, and you will find that in many cases over a period of years the track curvature has remained the same and the power has grown very materially, and you can't negotiate tracks today that you could 20 years ago."

(3) *The disabilities of a plant arising from the performance of a weighing service.* In its general report the Commission finds that (R. 38):

> "Practically all industries engaged in the production of iron and steel products, cement, sand and gravel, and similar heavy commodities, maintain track scales within their plants and weigh all cars handled both empty and loaded."
>
> * * * * *
>
> "Ordinarily the weights obtained by the industries are accepted by carriers for assessing freight charges, and the carriers are thus relieved of weighing on their scales."

Because the cars spotted at the plants in question move to and from the interchange tracks via the scales, where they are weighed, the Commission concludes[4] that a railroad

---

[4]In the opinion of the Commission, the important fact is not, apparently, the weighing service itself but rather, the interruption in the spotting service which it causes. In the case of the appellee Weirton Steel Company, for instance, the appellants, at page 95 of their brief, refer to "two separate and distinct switch movements via the Pennsylvania of cars spotted at the steel works." Although this particular interruption is not caused by the weighing of cars, nevertheless it is used by the Commission as evidence of the impropriety of including a spotting service in the line haul rates (R. 214).

could not perform the spotting service "in one uninterrupted movement at its ordinary operating convenience" (R. 50, 68).

What railroad service is there that is not subject to interruption? The position of the Commission that spotting must be accomplished without interruption in order to be within the scope of line haul rates is only indicative of a failure realistically to comprehend ordinary railroad operations. According to the undisputed testimony of a railroad official with reference to the appellee Weirton Steel Company (R. 214):

> "There is no more interference with the operations of this railroad by intraplant movements at this plant than there is ordinarily in any railroad yard. This carrier's schedule at this plant is made to conform with the industry's schedule. Only occasionally is there any interference by the industrial power. Such interference might arise from car failures, engine failures, or an unusually heavy amount of work within a certain distance. This interference is not serious enough to increase the operating costs ordinarily incurred in spotting an industrial plant. The same kind of interference also occurs within our own terminal yards."

On the same point the testimony of the Assistant General Manager of the Chicago & North Western Railway Co., is emphatic (R. 370, 371):

> "It seems to me from what I have heard here that a great many people have not the right conception of what constitutes switching on a team track. We would much rather switch in a well laid out industry than a team track. When you start switching a team track you are just as liable to switch out every other car and replace it and then possibly pay a claim for damage to the contents because it was not properly put down in the car. * * * And many times we have switched a

team track of 20 or 25 cars and only have taken two empties out, and the same may be true of 5, 6, or 7 other tracks in the same yard. We despise team track when it comes to switching. My answer assumes, of course, that we have no interference from the industry. We do not have any interference with the industry. We do not permit any."

The Vice-President of the Pennsylvania Railroad gave further light on this subject (R. 455):

"* * * if a man is unloading a car on a team track, using Pittsburgh Produce Yards, if you please, as a fair example of it, maybe he is almost through his job of unloading a car, and if we go in there and switch that car, he may not get it back for two hours to finish just a part of a load. Now, in that case, the engine comes up, the situation is looked over, and tolerance shown, and I should say that we missed the guess a great deal in our early consideration of this thing when we compared a siding to a team track, that we did not take into consideration those elements * * *."

Moreover, in *United States* v. *Union Stock Yards Co.*, 226 U. S. 286, 304, 305, this Court quoted with approval the following language from the decision in *Union Stock Yards Co.* v. *United States*, 169 Fed. Rep: 404, 406, wherein Mr. Justice Van Devanter (while a Circuit Judge) speaking for the Court of Appeals, said:

"Its (the Stock Yards Company's) operations * * * include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these

shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. *True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point.* * * *" (Italics supplied.)

POINT THREE

The Spotting Service at These Plants is, by Custom, Included in the Line Haul Rates.

In the brief of the appellants (page 28) it is acknowledged that—

> "Where work done by the shipper is in fact part of the transportation service under the line haul rates the Commission does not, of course, dispute that an allowance out of the rates is due the shipper (Sec. 15 (13))."

Whether or not the spotting service is included in the line haul rates is, of course, pertinent here. As stated by the Commission in its general report (R. 28):

> "If a carrier operates over private industrial tracks it is because in its discretion it elects to do so, and its legal obligations in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes. * * * Further, the rendition by the carrier of such services as are not contemplated by the com-

pensation which it receives free and without additional charge is prohibited by section 6 of the act. *American Exp. Co.* v. *United States, supra; Louisville & N. R. Co.* v. *United States, supra.*"

In each of the five cases at bar where an allowance is paid for the spotting the Commission finds, as stated in the typical report concerning the appellee Pittsburgh Plate Glass Company, that (R. 86):

> "By such payment the respondent carrier refunds or remits a portion of the rates or charges collected or received as compensation in the interstate transportation of property, in violation of section 6 (7) of the act."

And in the case of the appellee Weirton Steel Company where the carrier itself does the spotting it finds that (R. 103):

> "The switching service performed beyond the interchange tracks described of record is a plant service which respondent is not obligated to perform and for which it is not compensated under its line haul rates."

The Commission rests these findings upon two grounds, both untenable.

The *first* ground urged as justification for these findings is that, as stated by the Commission in its general report (R. 16, 17, 32):

> "The tariffs publishing the line haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for

'plant switching'[5] or 'spotting of cars at unloading point' to be performed at plant's convenience.

* * * * * *

"*In the absence of a tariff provision,* for a carrier to assume under its line-haul rates an obligation which is not properly includible under such rates is clearly in violation of section 6 of the act, and necessarily preferential." (Italics supplied.)

The difficulty with this finding is that it is based on a faulty premise. The railroads are under no legal obligation separately to charge for a spotting service; it may, as here, be included in the line haul rates. The point was clearly made[6] by this Court in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, 105, where it was held:

"The carrier is under no obligation to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered

---

[5]Not to be confused with intra-plant switching, that is, the movement of a car from one point in the plant to another point in the same plant, for which, as found by the Commission in its report (R. 15): "A charge would be collected if performed by the carriers."

[6]In *Mitchell Coal & Coke Co.* v. *P. R. R.,* 230 U. S. 247, 263, this Court, pointing to the well-established rule, held that "inasmuch as this rate included the haul the Railroad was bound to transport coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor."

And in *C. & O. Ry. Co.* v. *Westinghouse, Church, Kerr & Co., Inc.,* 270 U. S. 260-5, it was held that since the "service of spotting cars was included in the line-haul charge under both interstate and state tariffs, * * * an extra charge for performing this service was illegal. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act."

Compare *Wight* v. *U. S.,* 167 U. S. 512, where the line-haul rate did not cover the service performed either by its terms, or by general practice.

to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it."

And the *second* ground advanced in support of the same findings is that, as stated at pages 31 and 36 of appellants' brief, "it has never been and is not now general railroad custom and practice to treat the spotting service here involved as included in the transportation obligation under the line haul rate." The argument runs that throughout the decisions of the Courts and the Commission the validity of a distinction "between plant facilities and true agencies of transportation" has always "been assumed", and that "while the practice (of according a spotting service) is followed in considerable measure in the eastern industrial section, the carriers in that section by no means grant allowances to, or perform the spotting for, all industrial plants served by them."

It is submitted, however, that the position of the appellants is not sustainable, for the following reasons:

(a) There is no showing in the record that, at the plants which do not call upon the carriers to perform the spotting, a special condition is not present, such as an unwillingness on the part of the industry to admit the carrier. In such a circumstance, as we have seen, the transportation obligation is ended upon placement of the cars on the interchange tracks. In their brief (page 37) the appellants, as evidence of the lack of custom in according a spotting service, emphasize the fact that on the Pennsylvania Railroad, for example, there are "125 industries which perform their own spotting without allowances from the railroad." However, there is no evidence as to *why* these industries do their own spotting, and accordingly the following testimony of the Chief of Freight Transportation of the Pennsylvania Railroad, with reference to the same plants cited by the appellants, should be accepted (R. 338):

"In cases where the industry performs its own service and no allowance is made, generally the railroad is probably ready and willing to do the spotting that they are supposed to do, but the industry for some reason or other elects to do it themselves, although the railroad, if the industry did not want it, would do the spotting."

(b) If the validity of a distinction "between plant facilities and true agencies of transportation" be assumed, *arguendo*, it is significant to observe the application of such assumed distinction to spotting services *of the type here involved*. In *Car Spotting Charges*, 34 I. C. C. 609, in order "to comply with a suggestion of the Commission in the *Industrial Railways Case*",[7] substantially the same railroads that are presenting this brief filed tariffs proposing separately published spotting charges (over and above the regular line haul rates) at industrial plants described by the Commission as follows, at page 615:

"The basis of selection of industries, if there may be said to have been any such basis, varied with the different respondents. *The necessity for an intraplant service in addition to the movement of cars incident to the receipt and delivery of carload freight seems to have been controlling in some cases*, but in general the industries were arbitrarily selected, and range from the ordinary mill or factory with a single spur or private siding *to the large iron and steel industries having an interior system of rails called a plant railway.*" (Italics supplied.)

The tariffs were first suspended by the Commission and then ordered cancelled. The Commission held (34 I. C. C. 616, 618):

[7] 29 I. C. C. 212.

"The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant."

And again:

"As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary."

And again:

"* * * the mere fact that an industry is complex or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for the receipt or delivery of carload freight."

And again:

"To permit the carriers to add to the line-haul rate a charge for the movement of cars incident to the receipt and delivery of carload freight at industries selected because of their size or complexity, or upon some other basis equally uncertain, while treating a like service at all other industries as covered by the line-haul rate, would result in unjust discrimination of a flagrant character."

This decision takes on added significance when it is appreciated that, in cancelling the proposed imposition of

spotting charges at plants of *the general type as here involved*, the Commission had before it and expressly distinguished its prior decision in *General Electric Co.* v. *N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237.[8] With

---

[8]This same case, with the same factual situation, was litigated anew in the courts of New York State. *General Electric Co.* v. *N. Y. C. & H. R. R. Co.* (1916), 219 N. Y. 227; 114 N. E. 115; certiorari denied, 243 U. S. 636. To the extent this case may be considered, *arguendo*, as tending to restrict spotting services or the making of allowances therefor, the much later decision of the Supreme Court of Wisconsin in *Nekoosa-Edwards Paper Co.* v. *Railroad Commission* (1927), 213 N. W. 633, tends equally to a liberal view of the subject, and it is of interest to note that the court in deciding the latter case had before it the *General Electric* decision. In the *Nekoosa-Edwards Case* spotting allowances were upheld as lawful under the circumstances described, as follows:

> "The plaintiffs own and operate large paper mills with the facilities incident thereto, including a network of spurs and switch tracks. One plaintiff has four, and another has seven, miles of trackage. Plaintiffs individually own switch engines, hire crews therefor, and do all the switching at their plant, including intraplant switching. They take cars from the receiving tracks to their respective plants to the point of loading or unloading and return them to the receiving track when empty or loaded ready for outbound movement. Originally the carriers placed inbound cars at the plant where they were to be loaded or unloaded, as the case might be, and took the cars from the point of unloading or loading when they were ready for the outbound movement. Some of the plants were served by two, some by three, and one by four, separate railway systems. This made it necessary for the switching crews of the different railway systems to go upon the premises. It was difficult to arrange convenient times. They often interfered with each other's movements, and also with various movements of cars within the plant, and an arrangement was finally entered into by which the plaintiffs took the cars from the receiving track, loaded and unloaded, and placed them at the plants where they were to be loaded and unloaded, and, when the cars were ready for the outward movement, placed them again on the receiving track, from which they were taken by the carrier, so performing a service which prior to this arrangement had been performed by the carriers. It appears that this arrangement is more largely for the convenience of the plants than of the carriers. As the plants

reference to the cited case the Commission said (34 I. C. C. 617):

> "In *General Electric Co.* v. *N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237, we stated that common carriers could not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, *but the case did not require a decision of that question.* The point *actually decided* was that the complainant was not entitled to an allowance from the carrier for a service which the carrier was ready and willing to perform, and which the complainant performed because it was not convenient for it *to permit* the carrier to perform the service." (Italics supplied.)

Curiously enough, the same decision in the *General Electric Case* which the Commission distinguished in rejecting, in 1915, the publication of a spotting charge at industries of the same kind as here before the Court, is *now* heavily relied upon by the appellants as sustaining their propriety. Whatever other effects such inconsistency may have, it certainly does *not* support the Commission's conclusion that, at plants of the type here in question, spotting is excluded from the scope of line haul rates as a matter of recognized custom.

---

grew in proportion and the amount of intraplant switching increased, it became increasingly inconvenient to have the plant operations interfered with by the switching crews. When the whole movement, both that to be performed by the carrier and the intraplant movement to be performed by the plant, was done by one crew, the work could be organized and done much more expeditiously and economically. In order to arrive at the compensation, a system of cost accounting was installed, and the amount of $1.50 per car was allowed for the services performed by the plant for the carrier. This was believed to be slightly below its actual cost to the carrier."

(c) At the plants of two of the appellees the allowances are now being paid under alternative orders of the Commission. *Pittsburgh Plate Glass Co.* v. *Director General,* 58 I. C. C. 81; *Allegheny Steel Co.* v. *Director General,* 60 I. C. C. 575. In both instances, these appellees complained of discrimination and the Commission ordered the defendant carriers either to grant spotting allowances to them or cancel similar allowances paid to other plants, their competitors.

If, as now urged by the appellants, the payment of these same allowances is without consideration, forbidden and unlawful in violation of section 6 (7), the alternative orders in the cited cases were entered in the very teeth of decisions of this Court. In this connection, reference need only be made to pages 54 to 63, inclusive, of appellants' brief. It is there argued that the allowances involved in the instant proceeding are similar to the allowances condemned by this Court in *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, and *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, since they do not cover "transportation services for which the carriers may lawfully compensate," and "the record discloses that (they) are nothing more than a device to attempt to lend legality to the payment of rebates * * *." Accordingly, the appellants continue, the instant proceeding is not one in which the railroads should be left free to remove the discrimination by extending the payment of the allowances to others, and in this regard "this court's attention is particularly called" to its language in *Merchants Warehouse Co.* v. *United States, supra,* at page 513:

> "For reasons already indicated, the case is not one in which, as appellants argue, the carriers should be left free to remove the discrimination by extending

> the benefit of the allowances to the competing warehouses. * * * the objections to them would not be removed by extending them to some additional shippers of carloads at carload rates, but not to all, nor even to all under existing tariffs * * *."

In the circumstances, when the Commission in the *Pittsburgh Plate Glass* and *Allegheny Steel Cases, supra,* permitted the railroads to remove the discrimination complained of through the payment of spotting allowances, it necessarily found that the service of spotting was included in line haul rates. *Upon no other ground, upon no other factual basis could the Commission in accordance with the decisions of this Court as cited in the appellants' brief,* have entered alternative orders. To say, as the appellants now do, that spotting at the plants in question is not included in line haul rates is to ignore the Commission's express findings to the contrary[9] in these and many other similar cases.[10] Here again, whatever other effects such inconsistency may have, it certainly does *not* support the Commission's conclusion that, at plants of the type here involved, spotting is, by custom, excluded from the application of line haul rates.

(d) Most of the appellee plants are engaged in the iron and steel business. Only a few years ago the Com-

---

[9]This disregard of the Commission's own precedents is emphasized by the fact that, in now condemning the allowance paid to one of the appellees, the appellants rely, in large part, upon the identical testimony which was before the Commission when it ordered the railroad, in the alternative, to establish the allowance (R. 68).

[10]For example, see *Stewart Iron Co.* v. *Pennsylvania Co.*, 47 I. C. C. 512; *Donner Steel Co., Inc.* v. *Delaware, Lackawanna & Western R. Co.*, 57 I. C. C. 745; *Riter-Conley Mfg. Co.* v. *Director General*, 58 I. C. C. 327; *Central Iron & Steel Co.* v. *Pennsylvania R. Co.*, 59 I. C. C. 385; *Florence Pipe Foundry & Machine Co.* v. *Pennsylvania R. Co.*, 188 I. C. C. 215. The case last cited was decided September 30, 1932.

mission, following an exhaustive investigation, made a "thorough revision" of the rates on iron and steel articles in eastern territory. *Iron and Steel Articles,* 155 I. C. C. 517, 562; 161 I. C. C. 386; 161 I. C. C. 608. Clearly the line haul rates prescribed in that decision were not intended for application *only* to and from the interchange tracks of the iron and steel plants. On the contrary, there is not even a suggestion of such limited application in the Commission's report. In the understanding of the Assistant to the President of the Carnegie Steel Company (R. 491):

> "The scale of rates therein ordered by the Interstate Commerce Commission was with the full knowledge on the part of the railroads, the shippers, and the Commission that they covered this so-called terminal or spotting service. Otherwise there would, without doubt, have been serious objection on the part of the iron and steel shippers to the scale of rates ordered in by the Commission in that case."

Moreover, were it otherwise, the Commission would have fixed a separate spotting charge, as it did in 1916, in connection with the rates on iron ore. Iron Ore Cases, 41 I. C. 181; 44 I. C. C. 368. In the decision last cited, as pointed out by Commissioner Eastman in his dissenting opinion in *Carnegie Steel Co.* v. *Director General,* 132 I. C. C. 689, 699, 700, what the Commission "really found" was:

> "* * * that in the case of iron ore brought from the lake ports to the great iron and steel plants the duty of the carriers under their line-haul rates ends with delivery at some reasonably convenient point of interchange with the industry tracks and that the service of switching the cars from such points of interchange to points of unloading and returning them therefrom is

> a service which should be performed either by the industry itself or by the carriers for a separate charge."

As stated in the testimony of the Assistant to the President of the Carnegie Steel Company (R. 493):

> "With respect to the rates on iron ore, where the railroad does the work of carrying the car beyond our property line to the point of unloading, the roads assess and collect a spotting charge. That is under the decision in the Ore Spotting Case of 1916."
>
> * * * * *
>
> "* * * on iron ore the line-haul rate applies only up to the property line, and on everything else it includes spotting."

Iron and steel articles are not the only example. Coke is another commodity which, in large quantities, is both consumed at, and shipped by a number of the industrial plants considered in the Commission's proceeding. And yet, when the Commission recently prescribed scale rates for the transportation of coke in a large portion of Eastern territory, no spotting charge was provided, nor were the rates restricted for application to and from plant interchange tracks. *Coke between Points in Central and Illinois Territories*, 194 I. C. C. 640. The same is true with respect to rates prescribed or approved on bituminous coal, a commodity which of course is consumed in volume by most of the plants in question. *Bituminous Coal to C. F. A. Territory*, 46 I. C. C. 66; *Ohio-Michigan Coal Cases*, 80 I. C. C. 663; *Intrastate Rates on Bituminous Coal Within Ohio*, 192 I. C. C. 413; *Central Pennsylvania Coal Producers Assn., et al.* v. *B. & O. R. Co., et al.*, 196 I. C. C. 203; *Coal, Bituminous, Ex-River, from Colona and Conway, Pa., to Youngstown, O.*, 197 I. C. C. 617. It is also true of rates on industrial sand, *Industrial Sand Cases, 1930*, 188 I. C. C. 99; and stone, *Consolidated Stone Cases*, 200 I. C.

C. 65; and lumber, *Lumber Between Points in Official Territory*, 214 I. C. C. 493; 219 I. C. C. 429.

There are numerous other instances[11] where the Commission has prescribed rates on commodities which are either produced or consumed by industries of the kind here involved, and yet in no such instance is there to be found the slightest indication that the rates are to have a restricted application so far as spotting is concerned. In the circumstances the Commission has tacitly recognized that, *with the single exception of rates on iron ore*, the duty of the railroads under their line haul rates does not end with delivery or begin with receipt at plant interchange tracks but, on the contrary, includes a spotting service.

It can hardly be said, therefore, that the inclusion of a spotting service in the line-haul rates is unsupported by general practice and recognized custom. For the four reasons just enumerated, as well as those set forth in the brief of the appellees, the conclusion is inevitable that line-haul rates do include that service at the plants of the appellee companies, as well as others of the same kind.

POINT FOUR

The Payment of Allowances to Cover Spotting Services, or Their Performance by the Railroads, is in Conformity With Efficient and Economical Management as Contemplated by the Interstate Commerce Act.

Although apparently *abandoned* in appellants' argument before this Court, the final ground assigned by the Commission for holding the spotting service to be unlawful is that, as stated in its general report (R. 43):

---

[11] *Rates on Raw Dolomite and Fluxing Stone within State of Ohio*, 188 I. C. C. 495; *Lime from Eastern Trunk Line Points to Pittsburgh, Pa., Youngstown, Ohio, and related Points*, 93 I. C. C. 617; *Ohio Lime Mfgrs. Assn.* v. *P. R. R.*, 214 I. C. C. 417; *Eastern Brick Rates*, 218 I. C. C. 59.

> "Such payment (of spotting allowances) or performance (of spotting services) dissipates respondents' funds and revenues, is not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

In the dissenting opinion of Commissioner Mahaffie it is stated, with reference to this finding, that "while it is concluded that allowances are wasteful and contrary to the public interest, the jurisdictional findings necessary to support that conclusion are not made." His opinion continues (R. 44):

> "In determining whether a practice is wasteful we should be in position to find that it has an adverse effect on the carrier's net income. No such finding can, I think, be made as to the practices here held unlawful. Nor do I understand the majority so to find."

The only testimony of record on this point is to the effect that, should line-haul rates be restricted to exclude the spotting service, the railroads might well suffer in the diversion of traffic to trucks and waterways. On this subject the undisputed testimony of the Vice-President of the Pennsylvania Railroad is clear, and is confirmed by the testimony of one of the leading witnesses on behalf of the industries generally (R. 492, 453). The situation is not dissimilar from that discussed by the Commission in authorizing the institution of pick-up and delivery service in connection with less carload freight. As stated in the report in that case, *Pick-up and Delivery in Official Territory*, 218 I. C. C. 441, 467:

> "* * * the fact that respondents are here proposing a service which will add to their transportation costs, while in *Emergency Freight Charges, 1935, supra,*

> they sought an increase in their freight rates, is not necessarily inconsistent, as protestants contend, for rates, or a service, that will not move the traffic warrants an attempt to secure some revenue either by reducing the rates or improving the service if such can be reasonably accomplished."

There is no evidence in the record to support the Commission's finding of inefficient management, and in their brief the appellants point to none. No possible ground exists, therefore, for upholding it.

CONCLUSION

In the opinion of the railroads, the decree of the lower court should be affirmed.

Respectfully submitted,

THOMAS P. HEALY,
GUERNSEY ORCUTT,
ANDREW P. MARTIN,
MARION B. PIERCE,
CHARLES R. WEBBER,
M. CARTER HALL,
JERVIS LANGDON, JR.,
Solicitors for Railroad Companies, as Amici Curiae.

April 1, 1937.
1500 First National Bank Bldg.,
Richmond, Virginia.

APPENDIX A

The Railroad Companies on Whose Behalf the Foregoing Brief is Filed—

H. B. Stewart, Trustee of The Akron, Canton & Youngstown Railway Company, Debtor,
Ann Arbor Railroad Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers,
Baltimore & Ohio Railroad Company,
Bessemer & Lake Erie Railroad Company,
Central Railroad Company of New Jersey,
Chesapeake & Ohio Railway Company,
Chicago and Eastern Illinois Railway Company,
Chicago and Illinois Midland Railway Company,
Chicago, Indianapolis & Louisville Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings, George I. Haight, Trustees.
Chicago River & Indiana Railroad Company,
Delaware, Lackawanna & Western Railroad Company,
Detroit, Toledo & Ironton Railroad Company,
Elgin, Joliet & Eastern Railway Company,
Erie Railroad Company,
Grand Trunk Railway System,
Illinois Central Railroad Company,
Indiana Harbor Belt Railroad Company,
Lehigh & New England Railroad Company,
Lehigh Valley Railroad Company,
New York Central Railroad Company,
New York, Chicago & St. Louis Railroad Company,
New York, Ontario & Western Railway Company,
Norfolk & Western Railway Company,
Pennsylvania Railroad Company,
Pere Marquette Railway Company,

Pittsburgh & Lake Erie Railroad Company,
Reading Company,
Virginian Railway Company,
Wabash Railway Company, Norman B. Pitcairn and
Frank C. Nicodemus, Jr., Receivers,
Western Maryland Railway Company,
Wheeling & Lake Erie Railway Company.

SUPREME COURT OF THE UNITED STATES.

No. 734.—October Term, 1936.

The United States of America and Interstate Commerce Commission, Appellants, vs. American Sheet & Tin Plate Company, et al.	Appeal from the District Court of the United States for the Western District of Pennsylvania.

[May 17, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from decrees of a specially constituted District Court[1] of three judges enjoining and setting aside orders of the Interstate Commerce Commission which required certain carriers to cease and desist from spotting cars on industrial plant tracks as part of the service rendered under interstate line-haul rates and from granting allowances out of the line-haul rates to industries doing such spotting. The appellees are five industrial concerns affected by the orders. They contend that the spotting service in question is transportation within the meaning of the Interstate Commerce Act; that the performance of the service, or the payment of an allowance to an industry which itself performs it, is sanctioned by custom and practice and by previous adjudications of the Commission; and that line-haul rates were fixed in contemplation of the rendition of such service. They further charge the orders are void because not supported by the Commission's findings or the evidence.

Upon its own motion the Commission instituted an investigation known as "Ex Parte No. 104, Practices of Carriers affecting Operating Revenues or Expenses." Part II of that proceeding had to do with terminal services.[2] Voluminous evidence was adduced largely consisting of testimony by operating officials of carriers and traffic representatives of shippers touching the service of spotting cars at

[1] 15 F. Supp. 711.
[2] 209 I. C. C. 11.

points upon the systems of plant trackage maintained by large industries. The Commission's report summarized its conclusions based on the evidence as to conditions at approximately two hundred industrial plants where spotting allowances were paid by the carriers and numerous plants where such services were performed by the carrier. The Commission found that line-haul rates had not been fixed to compensate the carriers for the performance of the service in question and that the railroads, after fixing their rates, had assumed a burden not previously borne by them. It found that Section 15 (13) of the Act permitting allowances by carriers to those performing a portion of the service of transportation had been made the instrument of abuse by the payment of unwarranted allowances and added: "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, . . . the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery." In conclusion, the report states that payment for or exemption of the cost of service performed beyond such points of interruption or interference is in violation of Section 6, provides the means by which the industry enjoys a preferential service not accorded to shippers generally, dissipates the carrier's funds and revenues, is not in conformity with the efficient or economical management contemplated by the Interstate Commerce Act and is not in the public interest. No orders were made upon the footing of the main report, but thereafter, Division 6 promulgated supplemental reports recapitulating the testimony touching particular plants and making findings with respect to each and the service rendered thereat. Upon the basis of these supplementary proceedings orders to cease and desist were entered.[3] The carriers thereupon gave notice of a revision of the applicable

[3] The reports and orders affecting the appellees are the following: American Sheet & Tin Plate Company Terminal Allowance, 209 I. C. C. 719; Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273; Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467; Weirton Steel Company Terminal Allowance, 209 I. C. C. 445; West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213; Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527.

tariffs cancelling allowances or withdrawing the spotting service. Each appellee filed a bill praying that the order affecting it be set aside and enforcement be restrained. The causes were consolidated for hearing and were disposed of upon a single record in one opinion. Separate decrees were entered in the respective causes granting the requested relief. The appellants took a single appeal from all the decrees. We hold the Commission's orders were lawful and should not have been set aside.

First. The appellees urge that the orders are fatally defective because the Commission failed to make the necessary quasi-judicial findings. They point out that the Commission held that an allowance furnished a means whereby an industry enjoyed a preferential service not accorded to shippers generally, and constituted a refund or remission of a portion of the rates for transportation in violation of Section 6 (7) of the Interstate Commerce Act. They assert these conclusions are insufficient to support a cease and desist order because the Commission has not found, as it must to bottom an order on Sections 2, 3 and 15 (1) of the Act,[4] that the practice was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. Respecting Section 6 (7)[5] they say that as, by that section and Section 15 (13),[6] allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates. These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service which the carriers are

[4] 49 U. S. C. Secs. 2, 3 (1), 15 (1).
[5] 49 U. S. C. Sec. 6 (7).
[6] 49 U. S. C. Sec. 15 (13).

bound to render in respect of receipt and delivery of freight. The statute contains this definition: "The term 'transportation' shall include . . . all services in connection with the receipt, delivery, elevation, and transfer in transit . . . of property transported."[7] The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act[8] and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, "or otherwise in violation of the provisions of this act", to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist.[9]

Second. The Commission, so it is said, has approved allowances in instances such as those under review and by a long course of decision has sanctioned the practice; and the claim is that the carriers have relied upon the Commission's action in doing plant spotting or making allowance for the performance of that service by industries. We cannot agree either that the Commission has so decided or that if it had it would be concluded from re-examining the question in the light of existing conditions. The Commission has repeatedly dealt with the matter.[10] In numerous instances, upon application of an industry for the performance of spotting service on its plant track system, or for an allowance from the carrier for itself performing the service, the Commission, in the view that like service was performed or an allowance paid for it at other similar plants, has ordered the removal of discrimination as between shippers. On the other hand, in some cases the Commission has held that the service demanded was not a service of transportation and has refused to order the carrier to perform it.[11] But whatever may have been decided in the past, it is evident that the growth of the practice of making allowances for plant switching

[7] Act of June 29, 1906, c. 3591, Sec. 1; 34 Stat. 584; 49 U. S. C. Sec. 1 (3).

[8] 49 U. S. C., Sec. 12 (1).

[9] 49 U. S. C., Sec. 15 (1).

[10] *Associated Jobbers of Los Angeles* v. *A. T. & S. F. Ry. Co.*, 18 I. C. C. 310; *Car Spotting Charges*, 34 I. C. C. 609; *National Malleable Castings Co.* v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537, and many others.

[11] *General Electric Case*, 14 I. C. C. 237; *Crane Iron Works Case*, 17 I. C. C. 514, 209 Fed. 238. Compare *N. Y. C. & H. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115.

and the lack of uniformity in the practice of the carriers with respect to this service properly called for an investigation of the entire situation and the promulgation of appropriate orders to regulate the practice and prevent performance of a service not within the carrier's transportation obligation. The investigation and the consequent orders of the Commission were not foreclosed by its earlier decisions. The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service.[12] Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

Third. What has been said makes it unnecessary further to discuss the question of the adequacy of the Commission's findings. If supported, they are sufficient to sustain the orders made.

Fourth. The cases were heard by the District Court on the record made before the Commission. The appellees challenge the orders as without support in the evidence. Examination of the record discloses that there is substantial evidence to sustain the Commission's findings.

It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a "switching district" or "switching limits". Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry. The practice has come to be uniform that in delivering a car on a team track the carrier will spot the car at a point where merchandise of the class contained in the car is usually and most conveniently unloaded; thus there are particular team tracks or points where fruit and vegetables, furniture, etc., etc., are constantly loaded and unloaded and cars are spotted accordingly. In the analogous situation where an industry's warehouses or other facilities are located at given points on a spur or side-track, the carrier holds itself out to spot the car at the point where it is needed for loading or unloading, as a warehouse door, a scrap pile, etc., etc.

---

[12] *Los Angeles Switching Case*, 234 U. S. 294, 311; *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 508.

In the case of a large industry having many points of loading and unloading throughout its plant, the usual arrangement is to have lead tracks or interchange tracks on which the cars are, in the first instance, shifted; thence they are taken over plant tracks to various buildings and points and are spotted in accordance with the needs and convenience of the industry. It is asserted by the appellees that it has become customary to do this spotting on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without a charge additional to the line-haul rate. The record fails to establish any such custom. Carriers in official territory have, for perhaps thirty years, made allowances to certain industries for doing spotting within their plants. No uniform rule as to when such an allowance would be made has been adopted although there have been efforts to agree upon a rule. Apparently the plants most favored have been steel plants and some carriers have refused to extend the system of allowances to other than steel plants. It appears from the record that the making of allowances has not been governed by any principle and the cases fall into three general classes: (1) Where the plant does its own spotting and receives an allowance; (2) where the railroad does plant spotting; (3) where the industry does its own spotting and receives no allowance.

No allowances have been granted in New England territory, in the Southeast, or in the extreme Southwest. The practice of granting allowances has spread, to some extent, from official territory across the Mississippi and to the Northwest but here again there is no uniform rule about the matter. There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service.

The testimony of operating officials of the carriers and transportation officers of industries was not entirely consistent. Some took the position that it is the obligation of a carrier to spot a car on plant tracks if the spotting involves but a single uninterrupted movement which can be made at the carrier's convenience. Many took a broader view and indicated that in consideration of the large amount of traffic emanating from and terminating at a given plant the spotting of cars, in cooperation with the needs of the plant, would not involve a burden greater than the delivery of similar cars on team tracks. There was much opinion

evidence to the effect that the cost of spotting a car on plant tracks is no greater than that of placing a car on team tracks. There was, however, opinion evidence to the contrary, and facts were developed with respect to the amount of engine time involved in some of the operations under examination from which it may fairly be deduced that the industry switching involved greater expense than team track switching.

The Commission properly held that each case must be decided upon the circumstances disclosed. It accordingly examined the evidence respecting the operations at the plant of each of the appellees and made its findings with respect to each upon the evidence in the record. We find it unnecessary to detail that evidence since it is summarized in the Commission's reports. It is sufficient now to say that in every case the Commission found, upon sufficient evidence, that the cars were, in the first instance, placed upon lead tracks, interchange tracks or sidings and subsequently spotted from these tracks; in each instance the spotting service involved one or more operations in addition to the placing of the car on interchange tracks, such as moving it to plant scales for weighing, or some additional burden, such as conformance to the convenience of the plant, supply of special motive power required by the plant's layout or trackage or some other element which called for excessive service greater than that involved in team track spotting or spotting on an ordinary industrial siding or spur. We are unable to say that the findings in respect of the individual plants lacked support in the evidence. We are, therefore, bound to accept them and to hold the orders lawful.

The decrees will be reversed and the causes remanded for further proceedings in conformity with this opinion.

So ordered.

Mr. Justice BUTLER is of opinion that the commission's ruling that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks is not supported by the circumstantial facts found or by the evidence; that the orders here involved are based upon a misconstruction of the Act, and that the decrees of the district court should be affirmed.